Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In response to the federal government's invitation to U.S. fishermen to deploy large vessels to harvest under-utilized fish stocks, petitioner American Pelagic Fishing Co., L.P. ("APFC") invested $40 million in such a vessel, the *Atlantic Star*. After all required fishing permits were issued, Congress enacted special legislation revoking only the *Atlantic Star*'s permits and adopting vessel size limits barring only the *Atlantic Star* from fishing in any U.S. fisheries. The trial court found that the legislation deprived the *Atlantic Star* of all economically viable use and effected a compensable taking.

The court of appeals for the Federal Circuit reversed without performing any takings analysis. It held that the government's authority to regulate fishing precludes vessel owners from having a compensable property interest in using their fishing vessels to fish.

The questions presented are as follows:

1. Whether the government's authority to regulate a traditional property use is a "background principle" that excludes such a use from the owner's title and allows the government to restrict or abolish the use without any risk of takings liability.

2. Whether special legislation that targeted a single property owner, deprived that owner's property of all economically viable use, and defeated that owner's reasonable investment-backed expectations was a taking requiring the government to pay just compensation, as the trial court held on an undisputed factual record.

RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Pelagic Fishing Company, L.P. ("APFC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-36a, *infra*) is reported at 379 F.3d 1363. The order of the court of appeals denying petitioner's petition for rehearing en banc (App. 117a-118a) is unreported. The liability opinion of the Court of Federal Claims (App. 37a-70a) is reported at 49 Fed. Cl. 36. The damages opinion of the Court of Federal Claims (App. 71a-116a) is reported at 55 Fed. Cl. 575.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2004. Petitioner's timely petition for rehearing en banc was denied on December 9, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix (App. 119a-123a).

STATEMENT

The facts relevant to the takings claim are "not in dispute." App. 2a. The government first induced petitioner APFC to invest in a large fishing vessel, the *Atlantic Star*, to harvest under-utilized fish stocks in the Atlantic fisheries; next issued all required fishing permits to the *Atlantic Star*; and then, at the behest of rival fishermen, enacted special legislation revoking only the *Atlantic Star*'s permits and barring only the *Atlantic Star* from fishing in any waters in the Exclusive Economic Zone of the United States ("EEZ").

This special vessel legislation—the first of its kind in U.S. history—excluded only the *Atlantic Star* from operating anywhere in the EEZ while grandfathering all other authorized vessels that exceeded the new size limits. App. 119a-123a. The legislation was unforeseeable under the existing Magnuson Stevens Act[1] regulatory scheme; indeed, it specifically overrode that scheme, making it "uniquely unavailable" to petitioner. App. 54a. The legislation deprived the *Atlantic Star* of all viable economic use. *Id.* at 66a-67a. Following a careful application of the three-factor takings test set forth in *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), Court of Federal Claims Judge Bruggink concluded: "[I]f the Constitution doesn't protect private property under these circumstances, then I don't think it's worth the paper it's written on." CA App. 4624-4625.

The Federal Circuit reversed the trial court's judgment not by disputing its painstaking *Penn Central* analysis, but rather by reaching the astonishing conclusion that APFC was not entitled to any takings analysis because it did not have a compensable property interest in use of the fishing vessel it owned. According to the court, the United States' right to regulate fishing "precluded any permitted fisherman from possessing a property right in his vessel to fish." App. 28a.

The Federal Circuit thus held that the Fifth Amendment does not protect property uses over which the government has asserted regulatory authority. The implications of that ruling are staggering. Even if the decision were limited to regulated uses of personal property in public areas, like the use of a vessel in the EEZ—although the decision contains no suggestion that its reach is so limited—the consequences for the security of business investments would be alarming.

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[1] The 1976 Magnuson Fishery Conservation and Management Act, renamed the Magnuson-Stevens Fishery Conservation and Management Act when substantially amended in 1996, is codified at 16 U.S.C. § 1801 *et seq.* (hereinafter "Magnuson Act").

At minimum, the decision places the heavily regulated fishing and transportation industries—which invest billions of dollars in personalty such as cargo vessels, oceanliners, trucks, and airplanes for use in public spaces (such as the EEZ, internal waters, federal highways, and U.S. airspace)—on notice that the personalty uses they currently "enjoy," though now legal, are simply uses that the government has not yet "chose[n] to disturb." App. 24a. The government may at any time, according to the court of appeals, adopt unforeseeable use restrictions rendering such multi-billion-dollar property valueless, yet risk no obligation to pay just compensation.

Further, the Federal Circuit did not limit its ruling to uses of personal property. Its analysis applies equally to all uses of real property that, like uses of a vessel, are subject to regulation. Under the Federal Circuit's analysis, local ordinances requiring building permits and federal legislation governing wetlands use would preclude real property owners from acquiring a compensable property interest in building on their property by rendering it a matter of regulatory "permission." App. 29a. The government thus could impose new restrictions on the right to build a house on private property without restraint by the Takings Clause. As the Court has made clear in numerous cases, that is not the law.

The ruling below conflicts directly with *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). In *Lucas*, the Court held that the Takings Clause protects an owner's interest in using property in any manner not excluded from its title by "background principles" of property law. The court of appeals acknowledged that use of a vessel to fish in the EEZ was ***not*** proscribed by any "background principles" of common law—let alone by the Magnuson Act or its regulations, which govern fishing in the EEZ—when petitioner purchased the *Atlantic Star*. See Part I, *infra*.

But the Federal Circuit dramatically expanded the *Lucas* exception to the Fifth Amendment's protection. It deemed not only common-law and statutory schemes that ***prohibit*** particular uses, but also regulatory schemes that ***allow*** particular uses, to be "background principles" of property law that exclude such uses from title. The court reasoned that one cannot acquire a property interest in a use that is subject to governmental permission. App. 29a. In so ruling, the court of appeals excluded from Takings Clause protection most profitable property uses in our modern regulated world because most property uses require regulatory permission.

The court of appeals' decision also conflicts directly with *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). *Palazzolo* held that the fact that a particular property use was regulated before a new owner acquired title did not necessarily foreclose his claim that the preexisting regulation confiscated his property and that compensation was due. If a preexisting regulation proscribing a particular use does not necessarily foreclose an owner from acquiring a compensable property interest in the proscribed use, *a fortiori* a preexisting regulatory framework ***allowing*** a particular use, but subjecting it to a permitting requirement (like the Magnuson Act), does not necessarily foreclose an owner from acquiring a compensable property interest in the permitted use. Yet the court of appeals held that it did.[2]

As *Palazzolo* makes clear, a preexisting regulatory scheme—like the Magnuson Act framework that governed

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[2] In so ruling, the Federal Circuit converted a single factor in the three-pronged regulatory takings analysis—the inquiry into whether the restriction at issue defeated reasonable investment-backed expectations—into a threshold bar to the acquisition of a property interest and thus to any takings analysis at all. As we explain in Parts I.B and I.C, that ruling directly conflicts with this Court's decisions in *Palazzolo* and *Andrus* and numerous decisions by other courts of appeals.

APFC's right to fish—does not foreclose a *Penn Central* regulatory takings analysis, as the court of appeals held. Rather, as Justice O'Connor explained in her concurrence (533 U.S. at 634), and as the Court previously explained in *Andrus* v. *Allard*, 444 U.S. 51, 64 n.21 (1979), the existence of a regulatory scheme is but one factor in the "reasonable investment-backed expectations" prong of that analysis. The decision below, which impermissibly converts a single factor affecting one prong of the *Penn Central* analysis into a threshold bar to any analysis, thus is irreconcilable with *Palazzolo*. It also conflicts directly with the many decisions of the Federal Circuit's sister circuits deeming the government's regulatory authority to be but one factor in the *Penn Central* reasonable expectations inquiry rather than a bar to the very existence of a compensable property interest.

The petition should be granted to reverse the Federal Circuit's radical revision of regulatory takings jurisprudence. To allow its decision to stand would grant "the government[] power to redefine the range of interests included in the ownership of property" without "constrain[t] by constitutional limits" in stark violation of the Fifth Amendment. *Lucas*, 505 U.S. at 1014.

Factual Background. During the mid-1990s, federal governmental bodies actively urged U.S. fishermen to outfit large fishing vessels for entry into the underfished Atlantic mackerel and herring fisheries in the EEZ. A study commissioned by the United States Senate Finance Committee and prepared by the United States International Trade Commission concluded that only much larger ships than currently existed could provide the "economies of scale" necessary to improve the competitive position of U.S. fishermen in relation to European rivals. CA App. 624, 637. The National Marine Fisheries Service, the federal agency responsible for overseeing the EEZ fisheries, repeatedly reported that Atlantic mackerel and herring stocks were at record highs and

were woefully underfished. *Id.* at 610-614, 743-746, 748-749, 783, 808-809, 880-884.

Lisa Torgersen, a Seattle resident with extensive commercial fishing experience, accepted the government's invitation to outfit a large vessel to fish these stocks. She established petitioner, which invested $40 million to develop the *Atlantic Star*, a state-of-the-art vessel designed for "clean" mackerel and herring fishing that minimizes by-catch and other incidental environmental impacts. CA App. 602-603. The U.S. Coast Guard issued a Certificate of Documentation and, in early 1997, NMFS issued all required permits. *Id.* at 595, 599-600, 641.

In deciding to make her investment, Ms. Torgersen relied on the highly favorable regulatory regime governing this sector of the fishing industry. CA App. 595-96. Magnuson Act regulations required NMFS to issue and to renew Atlantic mackerel permits to all qualifying ships satisfying its conditions, like the *Atlantic Star*. 50 C.F.R. § 648.4(e), (j). NMFS had never revoked any permits other than for cause. CA App. 662-663. And the government previously had compensated permit holders when it reduced fishing capacity. *Id.* at 730, 793. Ms. Torgersen also knew that entry into these fisheries provided a vessel with valuable "historical fishing rights" that protected against later imposition of entry or catch limits. *Id.* at 730, 793, 3567.

As word of the *Atlantic Star* spread, opposition arose among local fishermen who feared competition from a more efficient vessel. App. 44a-45a. Members of the New England Fishery Management Council proposed limits on horsepower, length, and gross tonnage, carefully designed to exclude only the *Atlantic Star* and not their own vessels. Congress incorporated those limits in appropriations legislation it enacted in November 1997 (the "vessel legislation"), five days before the *Atlantic Star* was to launch. App. 45a; CA App. 825, 842.

The vessel legislation retroactively nullified only the *Atlantic Star*'s existing permits while leaving all other currently permitted fishery participants free to operate. App. 6a-7a; Pub. L. 105-119, § 616(a)(1). Further, it specifically excluded the *Atlantic Star* (*id.* § 616(b)) from a "grandfathering" provision (§ 616(a)(2)) that allowed all vessels exceeding the new size limits but possessing fishery endorsements as of September 25, 1997 (as did the *Atlantic Star*) to continue to operate in U.S. fisheries other than the Atlantic mackerel and herring fisheries. App. 119a-120a. The effect of that exclusion was to bar only the *Atlantic Star*—but not other vessels possessing fishery endorsements that exceeded the new size limits—from fishing in any regulated fishery in the EEZ.

Congress was well aware that, under the limitations it specified, the *Atlantic Star* would be "the only vessel * * * legislated out of existence." 143 Cong. Rec. E1556 (1997) (Statement of Rep. Metcalf). As Congress had anticipated, "no other vessel was affected by the legislation." App. 7a.

The legislation was the first in history to abrogate a vessel's existing permits or to bar a ship from fishing based on horsepower, length, or gross tonnage. App. 50a; CA App. 678, 869. Yet the legislative record contains no evidence that the *Atlantic Star* in particular—or large vessels in general—threatened any environmental or other harm. App. 47a-50a. The government's chief stock assessment scientist testified that the *Atlantic Star*'s entry into the Atlantic fisheries would have had no negative impact on mackerel or herring stocks, which were at "a historic level of high" abundance. CA App. 706, 709. NMFS publicly declared that Atlantic mackerel and herring stocks were neither "overfished" nor even "approaching overfished." NMFS, *Status of Fisheries of the United States* 11, 66 (1998) (CA App. 1033-1034). According to Senator Snowe, who sponsored the legislation, the fish stocks were "healthy" but "she had key constituents [who] were against" entry of the *Atlantic Star*. CA App. 3559.

The legislation removed any possibility of profitably operating the *Atlantic Star*. Without a mackerel permit, the *Atlantic Star* could not fish for Atlantic mackerel in the EEZ. 50 C.F.R. § 648.4(a)(5) (1997); App. 43a, 51a. Nor could it fish for herring, for which a permit was not required, because mackerel is an inevitable by-catch of herring fishing and because an authorization letter, issued to the *Atlantic Star* but abrogated by the legislation, is required to employ suitable nets in herring-abundant EEZ waters. 50 C.F.R. § 648.80(d); CA App. 605-606, 609, 791, 3575-3576. Nor could it fish for any other stock in the regulated fisheries of the EEZ because the legislation barred it from all those fisheries. App. 51a. Negotiating for foreign fishing rights, assuming their availability, would have taken years and a change of ownership or nationality, cost millions of dollars, and permanently barred the *Atlantic Star* from returning to U.S. fisheries. CA App. 616, 813, 3630. International waters lacked sufficient quantities of fish. *Id.* at 615, 3629-3630. Conversion to a non-fishing use would have been ruinously expensive and destroyed the value of the vessel and APFC's investment. *Id.* at 616.

Congress made the initially temporary restrictions permanent in May 1999. In July 1999, with the vessel deprived of any viable fishing opportunities and with creditors threatening to seize the vessel, petitioner's Dutch partners forced its sale. CA App. 617, 814, 3611, 4082-4083. In sum, the legislation deprived the vessel of all economically viable use for 20 months, and Ms. Torgersen lost her "entire equity investment in the *Atlantic Star*." *Id.* at 617.

Lower Court Proceedings. On facts that were "undisputed" and "deeply disturbing," the trial court[3] ruled on

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[3] The trial court had jurisdiction under 28 U.S.C. § 1491(a)(1), which provides that the United States Court of Federal Claims shall have jurisdiction over claims against the United States founded upon the Constitution.

cross-motions for summary judgment that petitioner had suffered a compensable temporary taking of its property, the *Atlantic Star*. App. 38a n.1, 54a. The court first held—as the government had conceded—that "[t]he *Atlantic Star*, *qua* ship, plainly constitutes property for Fifth Amendment purposes." *Id.* at 58a. The trial court further observed that fishing—the particular "use[] prohibited" by the vessel legislation—was "within the bundle of rights otherwise inherent in the vessel." *Ibid.* The court explained that such "personal property, like land, comes with an inherent right of use" absent a traditional or common law understanding excluding a particular use from title. *Id.* at 59a (citing *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). No such traditional understandings exclude fishing from the title of a vessel owner, the court noted. *Id.* at 61a. The court specifically rejected the government's contention that APFC lacked a property interest in using its vessel to fish because its right to fish was subject to regulatory permission under the Magnuson Act: "To say that the plaintiff's rights to fish were subject to a pervasive regulatory scheme—plainly they were—is not to say that nothing the government did with respect to those rights could ever implicate the Takings Clause." *Id.* at 59a.

Applying the three-factor analysis set forth in *Penn Central*, 438 U.S. at 124, the trial court concluded that Congress here exceeded established limits on regulatory action by overriding the regulatory scheme to remove, retroactively, a single vessel's permits, defeating petitioner's reasonable expectations, and depriving the vessel of all viable economic use. App. 65a-67a. After a trial on damages, the court awarded petitioner just compensation equal to the vessel's fair rental value during the takings period. *Id.* at 115a-116a.

The Federal Circuit reversed without engaging in a takings analysis, holding that the government's action did not implicate any Fifth Amendment property interest. App. 31a. The court acknowledged that APFC had owned the *Atlantic*

Star. It also acknowledged that "use of the Atlantic Star to fish was ***lawful*** not only under traditional property and nuisance principles, *Lucas*, 505 U.S. at 1030, but also under the regulatory regime by which its permits were issued." App. 21a-22a (emphasis added). Nonetheless, the court held, APFC—and all vessel owners—lacked a compensable property right to use their vessels to fish in the EEZ because, by adopting the Magnuson Act, Congress had granted the government "conservation and management" authority over the EEZ. By so "rendering the ability to fish in the EEZ a matter of governmental permission," Congress had "precluded any permitted fisherman" who subsequently purchased his vessel "from [acquiring] a property right in his vessel to fish." *Id.* at 28a-29a. The court thus removed Takings Clause protection from all property uses that are subject to a preexisting regulatory or permitting scheme.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION.

The Federal Circuit's ruling— that there can be no property right in a use that is subject to governmental regulation or permission—conflicts with precedents of this Court and other courts of appeals. The importance of this issue cannot be overstated. The ruling below would bar most regulatory takings claims at the threshold without any takings analysis, as it did in this case, because most regulatory takings claims involve property uses subject to an existing regulatory scheme. The court of appeals' ruling would thereby accord the government free rein to ban established uses of property without any check from the Constitution's just compensation requirement. The Court should reverse that ruling and instruct the Federal Circuit that the government's sovereign right to regulate does not insulate it from takings claims.

Where, as here, a regulation goes "too far," the Takings Clause requires the government to pay just compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).[4]

A. The Federal Circuit's Ruling Conflicts With This Court's Decision In *Lucas*.

Lucas provided a framework for analyzing whether a proscribed use of property is a property interest subject to the Takings Clause. The Court held that the Fifth Amendment protects an owner's interest in using its property in any manner not excluded from its title by "background principles" of property law. 505 U.S. at 1029. *Lucas* stressed that the "background principles" exception is narrow, limited to nuisances and dangerous uses long proscribed by State property and nuisance laws. *Id.* at 1029-1030. A particular use of property is excluded from an owner's title only if it has "always" actually been "unlawful" under "existing rules or understandings." *Id.* at 1030; see *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 168 (1998) (applying the *Lucas* property analysis to intangible personalty).

The Federal Circuit acknowledged that *Lucas* controls this case. App. 22a-23a. It further acknowledged that petitioner's "use of the *Atlantic Star* to fish was ***lawful*** not only under traditional property and nuisance principles, *Lucas*, 505 U.S. at 1030, but also ***under the regulatory regime by which its permits were issued.***" App. 21a-22a (emphasis added). Under *Lucas*, that ruling establishes that petitioner had a property interest protected by the Takings Clause.

Rather than follow *Lucas*, however, the Federal Circuit radically expanded the narrow "background principles" exception to Takings Clause protection that *Lucas* had recognized. According to the Federal Circuit, particular property

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[4] Petitioner does not raise herein an alternative argument pursued below that it had a property interest in its permits.

uses are excluded from an owner's title not only by "background principles" of common law or State property or nuisance law ***prohibiting*** the particular use, but also by federal statutes and regulations ***allowing*** the particular use but subjecting it to regulation or permitting requirements. App. 28a. Specifically, the court deemed the Magnuson Act, which allowed use of a fishing vessel like the *Atlantic Star* to fish in the EEZ at the time APFC acquired title to the vessel, to be a "background principle" excluding use of such vessels to fish in the EEZ from owners' titles because it subjected such use to regulation and permitting. *Ibid.* According to the court, by granting the government "sovereign rights" to "conserve and manage" the EEZ, Congress immunized the government from the just compensation requirement for whatever new restrictions on fishing in the EEZ it might choose to adopt. *Id.* at 26a-28a.

That ruling conflicts directly with the *Lucas* holding that property uses are excluded from an owner's title ***only*** by "background principles of [State] nuisance and property law" that ***prohibit*** those uses. 505 U.S. at 1030. Under *Lucas*, a particular use is not excluded from the owner's title unless the State or an adjacent landowner could have had it proscribed by a court. *Id.* at 1029. As the Federal Circuit acknowledged, that was not remotely true regarding petitioner's use of its fishing vessel to fish: the property use at issue—petitioner's permitted use of its fishing vessel to fish in the EEZ—was perfectly "lawful" under "traditional property and nuisance principles." App. 21a-22a.[5]

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[5] In fact, use of a fishing vessel to fish in the area now comprising the EEZ is a traditional property use long recognized at common law. As this Court explained, "the common people of England have regularly a liberty of fishing in the sea [as] a public common of piscary, and may not, without injury to their right, be restrained of it." *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 412 (1842). The right to use a fishing vessel to fish on the open seas dates back to

Petitioner's use of its fishing vessel to fish was also "lawful" under all statutes and regulations that existed when petitioner purchased and outfitted the *Atlantic Star*, as the Federal Circuit also acknowledged. *Ibid.* Indeed, it was precisely because operation of the *Atlantic Star* was indisputably lawful under the Magnuson Act and its regulations when APFC purchased the *Atlantic Star*, as evidenced by the fact that NMFS subsequently issued all required permits to the *Atlantic Star*, that Congress had to enact entirely new legislation to accomplish its aim of banishing the vessel. Thus, even assuming that recent federal regulatory enactments like the Magnuson Act can redefine the scope of traditional property interests by outlawing particular traditional property uses—a highly dubious proposition, see *Palazzolo*, 533 U.S. at 630—it is undisputed that none did so here prior to petitioner's purchase of the *Atlantic Star*.

In short, it is undisputed that the vessel legislation outlawed what previously had been a lawful property use of the *Atlantic Star*. Under *Lucas*, confiscatory regulations "cannot be newly legislated" without triggering scrutiny under the Fifth Amendment. 505 U.S. at 1029. The utter irreconcilability of *Lucas* and the Federal Circuit's decision is apparent: In *Lucas*, the use at issue—construction of a single family home on private property—was a traditionally recognized property use that presumably had long been subject to a governmental building permit requirement as well as to various land-use regulations. Similarly, in this case, use of a fishing vessel to

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ancient times and has been an integral part of the common law since the 17th century. See H. Grotius, FREEDOM OF THE SEAS 26 (1633) (Oxford U. Press 1916). Congress specifically recognized this right when enacting the Magnuson Act, stating that "[f]or well over 300 years, one of the most basic principles of the freedom of the seas has been the freedom of fishing," that is, "free and open access to all stock on the high seas." H.R. Rep. No. 94-445, at 24 (1975).

fish in the EEZ was a traditional property use that was authorized under existing regulations but subject to permitting and certain regulatory restrictions. Yet in *Lucas*, the preexistence of a regulatory and permitting scheme (see 505 U.S. at 1007-1008) did ***not*** prevent property purchasers from acquiring a property interest that could be taken by new legislation restricting the property use. Here, the Federal Circuit held the opposite—that the preexistence of the Magnuson Act regulatory and permitting scheme ***did*** preclude vessel purchasers from acquiring a property interest that could be taken by new legislation governing the EEZ.

The Court should grant certiorari to make clear to the Federal Circuit that, under *Lucas*, legislative schemes that subject traditional property uses to regulation and permitting requirements do not thereby eradicate property interests and immunize the government from liability for subsequently regulating such uses out of existence.

B. The Federal Circuit's Decision Conflicts With This Court's Decision In *Palazzolo*.

The ruling below—that the vessel legislation did not implicate any property interest simply because the Magnuson Act "was already in place" when APFC acquired the *Atlantic Star* (App. 28a)—also directly conflicts with the Court's decision in *Palazzolo*. In *Palazzolo*, the Court specifically rejected the proposition endorsed by the Federal Circuit, *i.e.*, that a "new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment." 533 U.S. at 629.

If an existing regulation that ***prohibits*** a particular property use does not prevent acquisition of a compensable property interest in the prohibited use, as the Court held in *Palazzolo*, *a fortiori* an existing regulatory framework (like the Magnuson Act) that ***allows*** a particular property use, but subjects it to a permitting requirement, does not prevent ac-

quisition of a compensable property interest in the permitted use. Yet the Federal Circuit held that it does.

As Justice O'Connor explained in her concurrence in *Palazzolo*, existing regulations—like the Magnuson Act regulations that governed petitioner's right to fish prior to its investment—do not ***foreclose*** acquisition of a property interest and hence a *Penn Central* regulatory takings analysis as the Federal Circuit held. Rather, they factor into the "reasonable investment-backed expectations" prong of that analysis. 533 U.S. at 635-636 (O'Connor, J., concurring); see also *Andrus*, 444 U.S. at 64 n.21 (rejecting the government's argument that, if the owners had acquired Indian artifacts after the effective date of the legislation restricting their use, they were barred at the threshold from asserting a takings claim and ruling instead that "[t]he timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations"); *Connolly* v. *Pension Ben. Guar. Corp.*, 475 U.S. 211, 227 (1986) (treating preexisting regulatory scheme as a factor in reasonable expectations inquiry); *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (same). The Federal Circuit erred by converting the presence of regulation from a single factor in the reasonable investment-backed expectations prong of the takings analysis into a threshold bar to the existence of any property right, foreclosing any takings analysis at all.[6]

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[6] That doctrinal error is particularly egregious where, as here, there is an undisturbed trial court finding on an undisputed record that the new legislation was "unforeseeable" under the preexisting regulatory regime. App. 66. Specifically, the trial court found that APFC's investment-backed expectations were "reasonable" under the preexisting Magnuson Act regime and that APFC could not have foreseen that Congress would make that regime "uniquely unavailable" to APFC. *Id.* at 54.

The Court should grant certiorari to rein in the Federal Circuit's sharp departure from *Palazzolo* and confirm that the government may not, "by prospective legislation[,] * * * shape and define property rights," thereby precluding subsequent owners from bringing takings claims simply because "they purchased or took title with notice of the limitation." 533 U.S. at 626. It should further confirm that *Palazzolo* applies with particular strength where, as here, the preexisting regulatory regime neither barred the property use at issue nor made it reasonably foreseeable that it would be barred. See *supra* n.6.

C. The Federal Circuit's Decision Conflicts With This Court's Decisions Recognizing That Regulatory Schemes Do Not Preclude Property Rights.

The court below ruled that the government's authority to regulate fishing cannot co-exist with recognition of a property right to fish in the EEZ because there can be no property right in a use subject to "governmental permission." App. 29a. But just as "the right to build on one's own property" is subject to the Takings Clause "even though its exercise can be subjected to legitimate permitting requirements" (*Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987)), the same is true of the right to use one's fishing boat to fish. The question in each instance is whether the regulations adopted are confiscatory, as assessed under the three-pronged *Penn Central* test.

The court of appeals' ruling is irreconcilable with the numerous cases in which this Court has engaged in a takings analysis notwithstanding that the subject property had long been subject to pervasive governmental regulation, including permit requirements. As noted *supra* pp. 13-14, *Lucas* is a prominent recent example: existing building permit requirements and land-use restrictions did not foreclose Lucas from acquiring a Fifth Amendment-protected property interest that

could be taken by new confiscatory legislation. The same has been true in numerous other cases. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687, 699 (1999) (affirming verdict for developer on takings claim based on permit denials); *Dolan* v. *City of Tigard*, 512 U.S. 374, 395 (1994) (governmental conditions on development permit took property interest); *Hodel* v. *Irving*, 481 U.S. 704, 712 (1987) (engaging in taking analysis where Congress had "broad authority to regulate the descent and devise of Indian trust lands"); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (Takings Clause requires just compensation for takings that result from the government's "exercise of jurisdiction over wetlands"); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 602 (1935) (Bankruptcy Act's elimination of lienholders' right to resort to mortgaged property was a taking despite the federal government's bankruptcy authority). Indeed, in *Penn Central* itself, the fact that the proscribed use required a construction permit did not mean that no property interest was at stake; otherwise the Court would have had no need to articulate and apply the factors pertinent to evaluation of the owners' takings claim.

In none of these cases did the Court preempt a takings analysis by holding, as did the court below, that there can be no property right to use property in a manner subject to governmental permission. The Court consistently has recognized that, although the government unquestionably has regulatory power to limit or even bar uses of property, it must pay just compensation when it exercises that power in a confiscatory manner, which only a takings analysis can assess.

The court of appeals sought to avoid this conclusion by suggesting that, by asserting "sovereign rights" to regulate fishing in the EEZ, the government had acquired "ownership" of the fish, thereby precluding APFC from acquiring a competing property interest to use its vessel to fish. App. 28a-29a. But this Court has rejected the cases on which the court of appeals relied (*id.*), holding that the government's

"sovereign rights" over fishing do ***not*** constitute "ownership" of fish and ***are*** subject to constitutional limitations:

> [I]t is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. * * * Under modern analysis, the question is simply whether the State has exercised its police power [to regulate fishing] in conformity with the federal laws and Constitution.

Hughes v. *Oklahoma*, 441 U.S. 322, 334-335 (1979). That question—"whether the [government] has exercised its police power [to regulate fishing] in conformity with" the Constitution—can be answered in a takings case only by performing the takings analysis disposed of by the Federal Circuit.[7]

D. The Federal Circuit's Ruling Conflicts With Decisions Of Other Courts Of Appeals And State Supreme Courts.

Because the Federal Circuit has exclusive jurisdiction over takings claims against the federal government, the ruling below will bar at the threshold ***all*** takings claims against the federal government involving restrictions on property

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[7] Nor should the Federal Circuit's invocation of the United States' "'sovereign rights'" over the EEZ (App. 26a, quoting 16 U.S.C. § 1811) confuse matters. All regulation is pursuant to the government's "sovereign rights" or "sovereignty" over the territory within which the regulated activity occurs. Indeed, even if the United States had asserted full "sovereignty" over the EEZ rather than lesser "sovereign rights," that still would not preclude private property interests within the EEZ. That point is illustrated by the indisputable fact that individuals possess private property interests protected by the Takings Clause within the territorial United States, over which the United States asserts full sovereignty.

uses that are subject to regulatory permission unless the Court intervenes. In similar circumstances, the Court repeatedly has reviewed questionable decisions of the Federal Circuit absent any conflict in the circuits. See, *e.g.*, *Scarborough* v. *Principi*, 124 S. Ct. 1856 (2004) (reversing Federal Circuit's decision dismissing claim against United States for lack of subject matter jurisdiction); *Franconia Assocs.* v. *United States*, 536 U.S. 129 (2002) (reversing Federal Circuit's ruling that contract repudiation and takings claims were properly dismissed as untimely).

Here, there is even greater reason to review the Federal Circuit's decision because it conflicts with rulings of other courts of appeals and state supreme courts regarding takings claims against ***state and local*** governments. These rulings recognize that the presence of a regulatory regime is not a bar to a property interest but simply a factor in determining whether a property interest was taken. *E.g.*, *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 26, 31-32 (1st Cir. 2002) (finding "a property interest" in tobacco companies' trade secrets notwithstanding the "heavy regulation" to which the states subject tobacco manufacturing); *Vulcan Materials Co.* v. *City of Tehuacana*, 369 F.3d 882, 887 (5th Cir. 2004) (holding that quarry lessee's right to mine limestone was property interest subject to takings analysis notwithstanding heavy local regulation of limestone mining); *Vesta Fire Ins. Corp.* v. *Florida*, 141 F.3d 1427, 1431 n.8 (11th Cir. 1998) (recognizing that "insurance contracts can be property subject to an unconstitutional taking" notwithstanding extensive state regulation of insurance industry); *Canel* v. *Topinka*, 818 N.E.2d 311, 325-326 (Ill. 2004) ("dividends accruing on stock held by the state" under unclaimed property statute constitute property subject to the Takings Clause notwithstanding state's pervasive regulation of such property); *Okemo Mountain, Inc.* v. *Town of Ludlow*, 762 A.2d 1219, 1227 (Vt. 2000) (regulatory power of state agency over public roads in state forests did not prevent abutting property

owner's right of access from being a property right subject to the Takings Clause).

The stark conflict between these decisions and the ruling below must be resolved because there is no principled reason why federal constitutional Takings Clause protection of property interests subject to government regulation should depend on whether the defendant is a federal, state, or local government. See, *e.g.*, *City of Monterey*, 526 U.S. at 704 (approving jury instructions for takings claim against local government that were consistent with principles set forth in *Lucas*); *Sheffield Dev. Co.* v. *City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004) (Texas courts "look to federal takings cases for guidance").

E. The Court's Guidance Is Needed To Prevent Misuse Of The "Background Principles" Exception To Property Rights.

Lucas declared that restrictions on property rights may not be "newly legislated or decreed" without implicating the Takings Clause. 505 U.S. at 1029. Yet the Federal Circuit and some State courts have misused the narrow "background principles" exception to property rights recognized in *Lucas* to allow just that.[8] By deeming existing government regula-

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[8] See Callies & Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust 'Exceptions' and the (Mis) Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 379 (2004) (criticizing courts that are "newly discovering or expanding [background] principles"); Burling, *The Latest Take on Background Principles and the States' Law of Property after* Lucas *and* Palazzolo, 24 U. Haw. L. Rev. 497, 502 (2002) ("governmental regulators and sympathetic courts have been quick to 'rediscover' (as opposed to define anew) limitations on the use of property"); Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the 'Rule Of Law'*, 42 N.Y.L. Sch. L. Rev. 345, 346 (1998) (criticizing holdings of New York's high-

tions to be "background principles" inhering in the owner's title, these courts deprive traditional property uses of Takings Clause protection. They thereby allow the government to adopt entirely new property restrictions of previously regulated uses free from constitutional constraint. Granting the petition will enable the Court to clarify that the "background principles" exception does not insulate government from its just compensation obligation when it restricts traditional property uses that are subject to regulation.

Absent correction by this Court, misuse of the "background principles" exception by the Federal Circuit and State courts threatens to nullify the *Lucas* framework. As Justice Scalia joined by Justice O'Connor observed in dissenting from denial of certiorari in *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1211 (1994): "Our opinion in *Lucas* * * * would be a nullity if anything that a State court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights." The point applies equally here, although the court that has "cho[sen] to denominate" a regulatory framework that is not "really such" is federal. The fact that this federal court has exclusive jurisdiction over all appeals involving takings claims against the federal government underscores the importance of reviewing its decision. Clarification of the meaning of "background principles" and specifically of the impact of regulatory schemes on the existence of property rights will ensure that this Court's precedents are adhered to and provide critical guidance to courts addressing these issues.

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est court that preexisting regulations "inhere in a purchaser's title").

II. THE COURT OF APPEALS' RULING THREATENS DESTRUCTION OF PROPERTY RIGHTS ON A VAST SCALE

The implications of the court of appeals' novel ruling that the government's sovereign regulatory authority ***forecloses*** a takings analysis are astounding. That ruling would enable the federal government to enact—without risk of consequence or compensation—confiscatory regulations throughout not only the EEZ but ***all*** areas over which the government has regulatory jurisdiction, including all navigable waters, federal lands, federal highways, and airspace. At minimum, the court of appeals' cramped view of property rights would immunize confiscatory bans on ***any*** use of personalty requiring a permit to operate in a federally regulated area. Permits are required for a barge to carry freight on a river, for a truck to carry cargo on public highways, and for a plane to fly over U.S. territory. Thus, according to the court below, new legislation barring barge, truck, or air transport would implicate no property right.

Moreover, there is no principled distinction between holding that government regulation of fishing in the EEZ forecloses a property interest and holding that regulation of ***any*** traditional property use, such as land development that is not a nuisance, forecloses a property interest. In both cases, the proscribed use depends on regulatory permission; in neither case has the use "always" been unlawful under "background principles" of property law; and in neither case does the proscribed use conflict with any competing property right of the government. The ruling below thus threatens ***all*** property, real or personal, use of which is subject to regulation.

These intolerable consequences flow from the Federal Circuit's absolutist approach. The Court long has stressed that whether a use restriction takes property requires a concrete analysis of "particular circumstances." *Penn Central*, 438 U.S. at 124. The ruling below circumvents that require-

ment by making the presence of regulation a threshold bar to the very existence of a property interest. If the government could routinely avoid paying the price of confiscatory measures based merely on the fact that the newly proscribed use was subject to "governmental permission," as the court of appeals held (App. 29a), the government could accomplish by legislation what it could not accomplish by physical seizure—complete abrogation of uses of property without risk of paying just compensation. If that were the law, the Takings Clause would no longer stand "as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980).

The court of appeals' decision will destabilize property rights. Today's regulatory regime could be withdrawn tomorrow and reinstated next month. The existence of a cognizable property right should not depend on each shift in the regulatory winds. Otherwise, private property will cease to be the protective bulwark against oppressive government intended by our Constitution's framers. See J. Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990).

As this Court has explained, the "character and value" of government is measured by "the securities which surround the individual in the use and enjoyment of his property." *Olson* v. *United States*, 292 U.S. 246, 254 (1934). Permitting the government to circumvent its compensation obligation merely by asserting its regulatory authority, as the court of appeals held, would undermine if not remove those securities by allowing the government to engage in cost-free confiscation. See D. Dana & T. Merrill, PROPERTY TAKINGS 42-43 (2002). The Court should reject such a judicial evisceration of the Takings Clause.

III. HAD THE FEDERAL CIRCUIT PERFORMED A TAKINGS ANALYSIS, IT WOULD HAVE HAD TO AFFIRM THE JUDGMENT FOR APFC.

Had the Federal Circuit proceeded to a takings analysis rather than improperly pretermitting one, it would have had to conclude that the vessel legislation worked a classic regulatory taking of petitioner's property. Based on a factual record that was largely "undisputed" (App. 38a n.1), the trial court correctly concluded that the vessel legislation worked a temporary taking under *Penn Central* because it was extraordinary governmental action that deprived APFC of all economically viable use of its vessel for 20 months and defeated APFC's reasonable expectations. App. 63a-70a. The Court therefore should reinstate the trial court's judgment.

Indeed, the trial court's finding that the *Atlantic Star* was deprived of "all profitable uses" during the takings period (App. 66a) makes this a "per se" or "categorical" taking under *Lucas*, 505 U.S. at 1027. Accordingly, there is no need to apply the *Penn Central* factors to reinstate the trial court's judgment. However, as the trial court correctly concluded, the *Penn Central* factors likewise establish a taking.

First, the character of the governmental action was "extraordinary." *Babbitt* v. *Youpee*, 519 U.S. 234, 239-240 (1997). The legislation overrode an existing regulatory framework to target a single owner's property interest. See *Nollan*, 483 U.S. at 835 n.4 (regulation may become a taking when owners are "singled out"). It abrogated valid permits, thereby imposing "severe retroactive liability on a limited class of parties that could not have anticipated the liability." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 528-529 (1998); see *Louisville Joint Stock Land Bank*, 295 U.S. at 601-602 (retroactive abrogation of security interests was a taking). Further, the legislation lacked a nexus to any conceivable harm to the flourishing fish stocks at issue. App. 42a. See *Nollan*,

483 U.S. at 837 (lack of proportionate "nexus" between the government's ends and means indicated taking).

Second, the economic impact on petitioner was devastating. As the trial court found on this "predominantly factual question" (*City of Monterey*, 526 U.S. at 720), the *Atlantic Star* was barred from fishing anywhere in the EEZ, thereby destroying any possibility of putting the vessel to profitable use. App. 51a-52a, 66a.

Third, the legislation interfered with petitioner's investment-backed expectations. Those expectations were eminently reasonable and based largely on the government's own data and assurances. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1013 (1984) (reliance on government's assurances made property owner's expectations reasonable). As the trial court found, APFC reasonably relied on (1) the government's urgings to deploy large vessels in the North Atlantic fisheries; (2) the absence of entry restrictions in the Atlantic mackerel and herring fisheries; (3) the permits the government issued to the *Atlantic Star*; (4) the regulations that mandated renewal of those permits except for misuse, absent here; and (5) the government's history of compensating permit holders when reducing fishing rights. App. 63a-65a. When APFC made its investment, vessel size limits had never been imposed or even suggested by Congress or NMFS. Even if APFC could have imagined, contrary to all evidence, that the government would restrict access to the Atlantic mackerel and herring fisheries, it could not reasonably have expected that its vessel alone would be targeted for banishment.

Finally, the trial court properly awarded just compensation equal to the *Atlantic Star*'s fair rental value during the takings period, based on voluminous trial evidence. See App. 110a-116a; *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 117 (1951) ("fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use"); *Kimball Laundry Co.* v. *United States*, 338

U.S. 1, 7 (1949); *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318 (1987). If the government had physically occupied the *Atlantic Star* for twenty months, it certainly would have had to compensate APFC for its temporary taking. See *Kimball Laundry*, 338 U.S. at 14. The appropriations legislation had precisely the same impact as a seizure, depriving APFC's vessel of "all profitable uses" until it was sold. App. 66a. The trial court properly applied the Court's temporary taking precedents to award just compensation equivalent to what APFC would have earned during that period but for the legislation. *Id.* at 110a-113a.

The court of appeals' ruling sanctions petitioner for accepting the government's invitation to invest in a large vessel to harvest underutilized fisheries. Allowing the government to play bait and switch without consequence not only flouts the Constitution and the Court's precedents but discourages private investors from relying on governmental assurances, thereby harming the interests of the United States. Reinstating the trial court's judgment will send a reminder to our elected representatives that the government remains constitutionally accountable when, at the behest of certain of its constituents, it requires "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2005

APPENDIX A

In the United States Court of Appeals for the Federal Circuit.

AMERICAN PELAGIC FISHING COMPANY, L.P., Plaintiff-Appellee,

v.

UNITED STATES, Defendant-Appellant.

No. 03-5101.

Aug. 16, 2004.

Before CLEVENGER, SCHALL, and BRYSON, Circuit Judges.

SCHALL, Circuit Judge.

The United States appeals the decision of the United States Court of Federal Claims that American Pelagic Fishing Co., L.P. ("American Pelagic") suffered a taking in violation of the Fifth Amendment to the U.S. Constitution, for which the court awarded damages in the amount of $37,275,952.67. *Am. Pelagic Fishing Co. v. United States*, 49 Fed.Cl. 36 (2001) (liability) ("*Am. Pelagic I*"); 55 Fed.Cl. 575 (2003) (damages) ("*Am. Pelagic II*"). We conclude, however, that American Pelagic did not suffer the taking of a property interest that is legally cognizable under the Fifth Amendment. We therefore reverse the decision with regard to liability, vacate the award of damages, and remand the case to the Court of Federal Claims with the instruction that it enter judgment in favor of the United States.

BACKGROUND

I.

This case involves commercial fishing for mackerel and herring in the Exclusive Economic Zone ("EEZ") of the United States in the Atlantic Ocean. The EEZ consists of the waters two hundred nautical miles from the coastal boundary of each state. See 16 U.S.C. § 1811 (2000); Proclamation No. 5030, 48 Fed.Reg. 10,605 (Mar. 14, 1983).

The pertinent facts are not in dispute. Throughout the 1990s, the National Marine Fisheries Service ("NMFS")[1] reported that mackerel and herring stocks in the Atlantic Ocean were at record highs and were substantially underfished. *Am. Pelagic*, 49 Fed. Cl. at 39. In 1993, a study commissioned by the U.S. Senate Finance Committee and prepared by the U.S. International Trade Commission concluded that only larger ships could improve the competitive position of the U.S. Atlantic mackerel industry with respect to European competitors. *Mackerel: Competitiveness of the U.S. Industry in Domestic and Foreign Markets*, Inv. No. 332-333, Pub. 2649 (Int'l Trade Comm'n June 1993). In 1994, following a recommendation by the Mid-Atlantic Fishery Management Council

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[1] The Magnuson-Stevens Fishery Conservation and Management Act, Pub.L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801-1883) ("Magnuson Act"), confers federal management authority over marine fishery resources upon the Secretary of Commerce ("Secretary") and the NMFS, a subunit of the National Oceanic and Atmospheric Administration, which is an agency within the Department of Commerce ("Commerce"). *See Am. Pelagic I*, 49 Fed. Cl. at 38-39.

("MAFMC"),[2] the NMFS rescinded its potential controls[3] over access to the Atlantic mackerel fishery, explaining that stocks were "extremely high" and harvesting low. *Atlantic Mackerel, Squid, and Butterfish Fisheries*, 59 Fed.Reg. 49,235 (Dep't Commerce Sept. 27, 1994) (rescinding the control date of August 13, 1992, set forth in *Atlantic Mackerel, Squid, and Butterfish Fisheries*, 57 Fed.Reg. 36,384 (Dep't Commerce Aug. 13, 1992)). In 1996, the MAFMC concluded that

> [i]n order to compete in the world bulk market, the U.S. will have to emulate its foreign competitors which harvest, process, and ship mackerel in large quantities so as to take advantage of economies of scale. Currently, the U.S. east coast industry does not have the large vessels necessary to participate in this market * * * .

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[2] The MAFMC is one of eight regional fishery councils charged with developing fishery management plans for fisheries within the EEZ in accordance with the standards set forth in the Magnuson Act. *See* 16 U.S.C. § 1851. The MAFMC has management responsibility for Atlantic mackerel, while the New England Fishery Management Council ("NEFMC") has management responsibility for Atlantic herring. Once a Fishery Management Plan ("FMP") is approved by the Secretary, it is promulgated by the NMFS. During the relevant time period in 1997, an official FMP was in place for the Atlantic mackerel fishery, but only a preliminary FMP was in place for the Atlantic herring fishery. *Am. Pelagic I*, 49 Fed. Cl. at 39.

[3] A "control date" provides notice to anyone subsequently entering a fishery that he is not assured of continued participation in the fishery should a limited entry scheme be implemented. *See, e.g., Atlantic Mackerel, Squid, and Butterfish Fisheries*, 57 Fed.Reg. 36,384 (Dep't Commerce Aug. 13, 1992).

Annual Quota Specifications for Atlantic Mackerel, Loligo, Illex, and Butterfish for 1997 12 (MAFMC July 1996).

For 1997, the NMFS established an allowable biological catch of 1.178 million metric tons of Atlantic mackerel, but commercial landings totaled only 15,406 metric tons. *Am. Pelagic I*, 49 Fed.Cl. at 39.[4] In its draft FMP for Atlantic herring in 1997, which was partially approved by the Secretary in 1999, the NEFMC proposed an allowable biological catch of 300,000 metric tons; yet, commercial landings totaled only 95,715 metric tons. *Id.* at 40.

II.

Lisa Torgersen is the President and sole shareholder of American Pelagic. *Am. Pelagic II*, 55 Fed.Cl. at 577. In November 1996, Atlantic Star Fishing Company, American Pelagic's predecessor, purchased a large, U.S.-flagged hull with the intent of transforming it into a commercial fishing vessel. *Id.* at 579-80. In January 1997, it contracted with a Norwegian shipyard to convert the hull into a freezer trawler—a large, commercial fishing vessel with the capacity to catch all of its own fish, freeze them on board, and offload them for shipping to their final destination. *Id.* at 579 n.6, 580. The result was the Atlantic Star, a vessel 369 feet long, displacing 6,900 gross tons, and having a total of 13,400 horsepower (about 7,000 horsepower for running the generators for the freezers and the remainder for propulsion). *Id.* at 580. Outfitted with the most sophisticated technology

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[4] The government's interrogatory responses indicate that commercial landings of Atlantic mackerel in 1997 totaled 15,406 metric tons, not 15,706 as the Court of Federal Claims stated in *Am. Pelagic I*, 49 Fed.Cl. at 39.

for locating, sorting, and freezing fish year-round, the *Atlantic Star* could safely hold 400 to 500 metric tons of fish. *Id.* at 580-81. American Pelagic's total investment in the vessel approached $40 million. *Am. Pelagic I*, 49 Fed. Cl. at 38.

While the vessel was being outfitted, American Pelagic set about applying for the necessary permits and gear authorizations. Pursuant to 50 C.F.R. § 648.4(a)(5) (1996), the *Atlantic Star* was required to carry on board a valid Atlantic mackerel permit to fish for, possess, or land Atlantic mackerel in or from the EEZ. Because of the potential for incidental bycatch, the *Atlantic Star* also was required to have a Northeast Multispecies (Nonregulated) fish permit. *Id.* § 648.4(a)(1). In April 1997, the Northeast Regional Office of the NMFS reissued both permits to American Pelagic:[5] Federal Fisheries Permit # 610018 for, *inter alia*, Atlantic mackerel, expiring December 31, 1997; and Federal Fisheries Permit # 610018 for Northeast Multispecies (Nonregulated), expiring April 30, 1998. In addition, pursuant to 50 C.F.R. § 648.80(d) (1996), on August 28, 1997, the Northeast Regional Office issued to American Pelagic a Gulf of Maine/Georges Bank Midwater Trawl Gear Authorization letter for, *inter alia*, Atlantic herring, expiring April 30, 1998.[6] *Am. Pelagic I*, 49 Fed. Cl. at 40.

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[5] Initially, the permits were issued to the Atlantic Star Fishing Company on February 5, 1997. *Am. Pelagic I*, 49 Fed.Cl. at 40.

[6] American Pelagic was required to carry this authorization letter because it planned to harvest fish with midwater trawl gear of mesh size less than that normally required by the regulations. 50 C.F.R. § 648.80(d).

III.

During 1997, as Ms. Torgersen prepared for commercial operation, opposition to the *Atlantic Star* began to develop. *Id.* Concerns about the size of the vessel and its potential effect on the Atlantic mackerel and herring fisheries were voiced at a joint meeting of the Herring Section of the Atlantic States Marine Fisheries Commission and the NEFMC Herring Committee in March 1997. These concerns subsequently were incorporated into legislation introduced in the U.S. House of Representatives to establish a moratorium on any fishing vessel, in the Atlantic mackerel and herring industries, equal to or greater than 165 feet in length, with an engine of more than 3,000 horsepower. *Id.* at 40-41 (citing H.R. 1855, 105th Cong. (1997)). In September 1997, a similar bill was introduced in the U.S. Senate. The Senate bill would have revoked Atlantic mackerel or herring permits that had been issued to vessels 165 feet or longer with an engine of more than 3,000 horsepower. *Id.* at 41 (citing S. 1192, 105th Cong. (1997)).

Despite the fact that neither bill was enacted, Congress passed a rider to an appropriations act that effectively cancelled American Pelagic's existing permits and authorization letter, and at the same time prevented any further permits from being issued to the *Atlantic Star*. *Id.* at 41-42 (citing text of Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub.L. No. 105-119, § 616, 111 Stat. 2440, 2518-19 (1997) ("1997 Appropriations Act")). The following year, Congress enacted the identical provision in another

appropriations act,[7] and in 1999, it made the size limitation and permit revocation permanent.[8] *Id.* at 42. The NMFS has since promulgated regulations reflecting this prohibition.[9] *Id.* As a result of the legislation, the *Atlantic Star* was unable to receive a permit to fish in any U.S. fishery within the EEZ; at the time, no other vessel was affected by the legislation. *Id.* at 42, 43.

After the *Atlantic Star's* permits were cancelled, American Pelagic took the vessel to the Baltic Sea to participate in a research project. During this time, the vessel operated as a "mother ship": it did not catch fish itself but merely processed the fish caught by other vessels. Because the venture was not profitable, the *Atlantic Star* spent only a few months in the Baltic. Subsequently, American Pelagic took the *Atlantic Star* to Mauritania, off the coast of west Africa, and purchased fishing rights for those waters while maintaining its status as a U.S.-flagged vessel. The vessel

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[7] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, Pub.L. No. 105-277, tit. II, § 202, 112 Stat. 2681, 2681-618 (1998) ("1998 Appropriations Act").

[8] 1999 Emergency Supplemental Appropriations Act, Pub.L. No. 106-31, § 3025, 113 Stat. 57, 100-101 (1999) ("1999 Appropriations Act") (amending section 617 of the 1998 Appropriations Act).

[9] See *Fisheries of the Northeastern United States*, 64 Fed.Reg. 57,587 (Dep't Commerce Oct. 26, 1999) (revising 50 C.F.R. pt. 648 and imposing size and power limitations on vessels in the Atlantic mackerel fishery); *Magnuson-Stevens Fishery Conservation and Management Act Provisions*, 65 Fed.Reg. 77,450 (Dep't Commerce Dec. 11, 2000) (revising 50 C.F.R. pt. 648 and imposing size and power limitations on vessels in the Atlantic herring fishery).

and its equipment performed to expectations; however, the lack of fish and warm water temperatures prevented the *Atlantic Star* from being profitable. American Pelagic chose not to reflag the *Atlantic Star* and obtain authorization to fish in a foreign fishery. By April 1999, American Pelagic was operating at a loss. After unsuccessful attempts to secure additional financing, and after rejecting Chapter 11 bankruptcy, American Pelagic sold the *Atlantic Star* to two of its partners on July 6, 1999. *Am. Pelagic II*, 55 Fed. Cl. at 582-83.

IV.

American Pelagic brought suit in the Court of Federal Claims in March 1999, alleging that the 1997 and 1998 Appropriations Acts revoking its permits and barring it from receiving future permits effected a temporary taking of the *Atlantic Star*. *Am. Pelagic I*, 49 Fed.Cl. at 44. In its complaint, American Pelagic asserted that it had a property right in its fishery permits and authorizations that was taken by the legislation. Compl. ¶¶ 58, 64. American Pelagic further asserted that the United States had "taken, destroyed, and deprived [American Pelagic] of its compensable, investment backed expectations in the use and operation of the [*Atlantic Star*]" and had "taken all economically viable use" of the vessel. *Id.* ¶¶ 59-60, 65-66. Thus, American Pelagic alleged a taking of its property without just compensation in violation of the Fifth Amendment. *Id.* ¶¶ 61, 67. American Pelagic sought relief in the form of "the fair market value" of its property that had been taken, measured as "the expected net revenues or profit from operation of the [*Atlantic Star*] in the fisheries of the United States" during the fiscal years 1998 and 1999. *Id.* It estimated its just compensation to be in or around $10 million for each fiscal year, not including pre-or postjudgment interest, damages, costs, and attorneys' fees. *Id.* "Prayer for Relief" ¶¶ 1-3. In due course, the parties filed

cross-motions for summary judgment. On April 4, 2001, the Court of Federal Claims granted summary judgment in favor of American Pelagic on the issue of liability. *Am. Pelagic I*, 49 Fed. Cl. 36.

The court started from the premise that because licenses and permits are traditionally not protected by the Takings Clause, the *res* potentially taken by the legislation consisted of the *Atlantic Star* itself, which the government conceded to be property for Fifth Amendment purposes. *Id.* at 46. The court then explained, "To determine whether a property right exists independent of the regulatory scheme, it is necessary to decide 'whether an independent or preexisting right of use under common law applies.' " *Id.* at 47 (quoting *Maritrans Inc. v. United States*, 40 Fed. Cl. 790, 796 (1998)). In that context, the court determined that

> [t]he relevant stick in the bundle in this context is the right to use the *Atlantic Star* to fish, subject to regulation. * * * We are not confronted here with a property or a use which is inherently dangerous or a nuisance. There is nothing in the nature of a fishing vessel that suggests that any use is totally a matter of governmental grace. * * * Absent such a built-in limitation, personal property, like land, comes with an inherent right of use. We note that the right to use is one of the group of rights inhering in the citizen's relation to [a] physical thing.

Id. (citations and internal quotation marks omitted). The court thus determined that American Pelagic possessed a property interest "in using [the *Atlantic Star*] to fish." *Id.* at 48.

The court then embarked upon a regulatory takings analysis. In its analysis, the court decided that all three factors of the *Penn Central* test weighed in favor of finding that a regulatory taking had occurred: (i) American Pelagic's investment-backed expectation of participating in the

Atlantic mackerel fishery was reasonable; (ii) the degree of economic impact was severe enough to leave the *Atlantic Star* with no commercially viable uses; and (iii) the character of the government action, in purpose and effect, was both retroactive and targeted at American Pelagic. *Id.* at 48-51 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

The parties proceeded to a trial on damages in December 2002. *Am. Pelagic II*, 55 Fed.Cl. 575. The court awarded American Pelagic damages in the amount of the fair rental value of the *Atlantic Star*. In the absence of any market for leasing such a vessel for fishing off the east coast of the United States, the court derived a model for fixing the fair rental value based upon a "reasonably established net revenue stream" as presented by American Pelagic, with minor modifications. *Id.* at 584-90, 592-95. Ultimately, the Court of Federal Claims awarded American Pelagic damages in the amount of $37,275,952.67 for what it described as "a temporary regulatory taking of all value of its vessel for a twenty month period."[10] *Id.* at 595.

The government has timely appealed the Court of Federal Claims' decisions on both liability and damages. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

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[10] In *Am. Pelagic II*, the court also affirmed its previous analysis of the three Penn Central factors in light of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which issued after *Am. Pelagic I* and which reaffirmed that the *Penn Central* analysis is the proper way to address whether a temporary regulatory taking has occurred. 55 Fed. Cl. at 590-91 (quoting *Tahoe-Sierra*, 535 U.S. at 335).

ANALYSIS

I.

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. Cl. R. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). We review a grant of summary judgment by the Court of Federal Claims *de novo* to determine whether it correctly applied this standard. See *Cienega Gardens v. United States*, 265 F.3d 1237, 1244 (Fed. Cir. 2001). We affirm if, when the facts are viewed in the light most favorable to the nonmoving party and doubts are resolved against the movant, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Helifix, Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1345-46 (Fed. Cir. 2000). Whether a compensable taking has occurred is a question of law based on factual underpinnings. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1350-51 (Fed. Cir. 2003) (citing *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)). As noted above, in this case, the pertinent facts are not in dispute.

In reviewing a final decision of the Court of Federal Claims after a trial, we review legal conclusions *de novo*, and we review factual findings under the clearly erroneous standard. *Id.* (citing *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1379 (Fed. Cir. 2001)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The government challenges both the grant of summary judgment on liability and the award of damages to American Pelagic. Because our ruling on the issue of liability disposes of the case, we do not reach the government's challenge to the award of damages.

II.

The law generally applicable to takings claims is well settled. The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V, cl. 4. The purpose of this prohibition is to prevent "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Real property, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); personal property, *see Andrus v. Allard*, 444 U.S. 51, 65 (1979); and intangible property, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984), each may constitute the *res* of a takings claim. The Supreme Court has recognized that the government may "take" private property either by physical invasion or by regulation. *Lucas*, 505 U.S. at 1014-15. This case involves an alleged regulatory taking. "A 'regulatory taking may occur when government action, although not encroaching upon or occupying private property, still affects and limits its use to such an extent that a taking occurs.'" *Cienega Gardens*, 265

F.3d at 1244 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).[11]

We have developed a two-part test to determine whether a taking has in fact occurred. *See Maritrans*, 342 F.3d at 1351 (citing *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153-54 (Fed.Cir.1995)); *see also Conti v. United States*, 291 F.3d 1334, 1339 (Fed.Cir.2002), *cert. denied*, 537 U.S. 1112 (2003). First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment. *Maritrans*, 342 F.3d at 1351. "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt*, 271 F.3d at 1096 (citing, *inter alia*, *Almota Farmers Elevator Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992)). If the claimant fails to demonstrate the existence of a legally cognizable property interest, the courts task is at an end. *Maritrans*, 342 F.3d at 1352 (citing *M & J Coal*, 47 F.3d at 1154).

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[11] American Pelagic alleged a temporary, as opposed to a permanent, taking of its property interest. Temporary takings are not different in kind from permanent takings—a temporary taking simply occurs when what would otherwise be a permanent taking is temporally cut short. *Wyatt*, 271 F.3d at 1097. "The essential element of a temporary taking is a finite start and end to the taking." *Id.* In this case, the time period of the alleged taking ran from November 26, 1997, the date upon which American Pelagic's permits and authorization letter were revoked in the 1997 Appropriations Act, to July 6, 1999, the date on which the *Atlantic Star* was sold. *See Am. Pelagic II*, 55 Fed. Cl. at 576; Compl. ¶ 57.

Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest. *Chancellor Manor v. United States*, 331 F.3d 891, 902 (Fed.Cir.2003) (citing *M & J Coal*, 47 F.3d at 1153-54). With regard to this second inquiry, we have stated that it is important to decide at the outset whether the alleged taking was "categorical" or not. *Id.* (citing *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed.Cir.2001) (on rehearing)). In *Rith Energy*, we explained the difference between a categorical and a noncategorical taking: A categorical taking has been defined as one in which "all economically viable use, i.e., all economic value, has been taken by the regulatory imposition." *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir.), *modifying* 208 F.3d 1374 (Fed. Cir. 2000). A categorical taking is distinct from a taking "that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use." *Id.* 247 F.3d at 1362. When a taking is noncategorical, the court will undertake the fact-based inquiry enumerated in *Penn Central* to evaluate whether the governmental action constituted a compensable taking of the property interest. *Maritrans*, 342 F.3d at 1351. The three *Penn Central* factors are (i) the character of the governmental action, (ii) the economic impact of the action on the claimant, and (iii) the extent to which the action interfered with the claimant's reasonable investment-backed expectations. 438 U.S. at 124. On the other hand, when the taking is categorical, we have explained that "analyzing whether compensation is due does not require an inquiry into whether the plaintiff had reasonable investment-backed expectations that were defeated by the regulatory measure that gave rise to the takings claim." *Rith Energy*, 247 F.3d at 1362 (citing *Palm Beach Isles Assocs.*, 231 F.3d at 1357).

III.

Preliminarily, American Pelagic alleged that it had a property right in its "lawfully duly issued fishery permits and authorizations" that was "appurtenant to the use and operation of [American Pelagic's] fishing vessel, the [*Atlantic Star*]." Compl. ¶¶ 58, 64; Br. Pl.-Appellee at 27-29. According to American Pelagic, this property right was taken by the United States because the fishery permits and authorization letter had already been issued when the 1997 Appropriations Act was passed, and at the time, the NMFS lacked the discretion not to renew them. Br. Pl.-Appellee at 27-29. The Court of Federal Claims concluded, however, that no such property right existed: "Licenses or permits are traditionally treated as not protected by the Takings Clause because they are created by the government and can be cancelled by the government and normally are not transferable." *Am. Pelagic I*, 49 Fed. Cl. at 46.

On appeal, American Pelagic reasserts its contention that it had a legally cognizable property interest in its lawfully issued fishing permits and authorization letter. First, it argues that the permits and authorization letter were mandatory, rather than discretionary. *See Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir.1998) (finding, for purposes of a procedural due process claim, a constitutionally protectible property interest in a fishing quota permit from the NMFS because the NMFS had no discretion to deny a permit application if regulatory requirements were met). According to American Pelagic, the only grounds for denying their issuance or renewal were incomplete, late, or altered applications, or the failure to meet eligibility requirements, none of which applied in the case of the *Atlantic Star*. 50 C.F.R. § 648.4(e), (i). American Pelagic also argues that the permits could only have been revoked or

suspended for a specified "offense" or for failure to pay a penalty, neither of which occurred in this case. *Id.* § 648.4(m); 15 C.F.R. § 904.301(a) (1997).

The government responds that American Pelagic did not have a property interest in its fishery permits. In support of its position, it cites *Conti*, 291 F.3d at 1341, which concluded that a swordfishing permit did not confer a property interest for purposes of the Takings Clause. The government explains that American Pelagic's permits were not transferable or assignable, 50 C.F.R. § 648.4(k);[12] that they did not confer exclusive fishing privileges; and that they could be revoked, suspended, or modified by the government, *id.* § 648.4(h), (m).[13] In addition, the government distinguishes a constitutionally protected right to a permit under a due process analysis from a compensable property right under a Takings Clause analysis; according to the government, the two are not coterminous. The government points out that in *Foss*, upon which American Pelagic relies, the court actually engaged in a procedural due

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[12] Section 648.4(k) provides: "A permit issued under this part is not transferable or assignable. A permit will be valid only for the fishing vessel, owner and/or person for which it is issued." 50 C.F.R. § 648.4(k).

[13] Section 684.4(h) provides: "A permit will continue in effect unless it is revoked, suspended, or modified under 15 CFR part 904, or otherwise expires, or ownership changes, or the applicant has failed to report any change in the information on the permit application to the Regional Administrator as specified in paragraph (f) of this section." *Id.* § 648.4(h). Section 684.4(m) provides: "The Assistant Administrator may suspend, revoke, or modify, any permit issued or sought under this section. Procedures governing enforcement-related permit sanctions or denials are found at subpart D of 15 CFR part 904." *Id.* § 648.4(m).

process analysis, not a Fifth Amendment takings analysis. The government also points out that 15 C.F.R. § 904.301(a), upon which American Pelagic relies for the mandatory nature of its permits, specifically states that "Nothing in this subpart precludes sanction or denial of a permit for reasons not relating to enforcement."

We conclude that American Pelagic did not and could not possess a property interest in its fishery permits and authorization letter. In *Conti*, we explained that because he could not assign, sell, or transfer his swordfishing permit, because it did not confer exclusive fishing privileges, and because the government at all times retained the right to revoke, suspend, or modify it, Paul Conti did not possess a property interest in his permit. 291 F.3d at 1341-42. This "absence of crucial indicia of a property right, coupled with the government's irrefutable retention of the right to suspend, revoke, or modify" the swordfishing permit "compels the conclusion that the permit bestowed a revocable license, instead of a property right." *Id.* at 1342. The same reasoning extends to American Pelagic's permits and authorization letter. There is simply no contention that American Pelagic had the authority to assign, sell, or transfer its permits and authorization letter,[14] nor that it was granted exclusive

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[14] Although American Pelagic contends that its permits were potentially transferable to future owners of the *Atlantic Star*, it does not contend that those permits were transferable to a different vessel. Moreover, American Pelagic does not argue that it had the authority to effect a transfer of its permits to future owners of the *Atlantic Star*. It asserts only that future owners of the same vessel could apply for the same permits held by American Pelagic, and if they qualified, the permit numbers would stay the same and remain with the vessel.

privileges to fish for Atlantic mackerel and herring in the EEZ. American Pelagic distinguishes its permits from Mr. Conti's only by alleging that the government could not refuse to issue or reissue, revoke, modify, or suspend them in the absence of specified conditions. As the government notes, however, the regulation upon which American Pelagic relies specifically provides that "Nothing in this subpart precludes sanction or denial of a permit for reasons not relating to enforcement." 15 C.F.R. § 904.301(a). This language preserved the government's right to deny or sanction the permits and authorization letter issued to the *Atlantic Star*. The conditions we set forth in Conti are therefore met. We agree with the Court of Federal Claims that American Pelagic did not possess a property interest in its fishing permits and authorization letter.

IV.

American Pelagic's main contention in the Court of Federal Claims was that the 1997, 1998, and 1999 Appropriations Acts, as implemented in 50 C.F.R. pt. 648, effected a taking of the use of the *Atlantic Star* for fishing in the Atlantic mackerel and herring fisheries in the EEZ.[15] Compl. ¶¶ 57-58, 60-61. Specifically, American Pelagic

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[15] It is undisputed that American Pelagic had a property interest in the *Atlantic Star*. *See Am. Pelagic I*, 49 Fed. Cl. at 46. However, American Pelagic does not contend that the *Atlantic Star* itself was taken by the revocation of its permits and authorizations. In fact, as the trial court explained, "the owner was left with the ship; it was not physically taken. Instead, restrictions merely were placed on its use." *Id.* Thus, American Pelagics main contention, as stated in its complaint, was that the revocation of its permits and authorizations took from it the right to use the *Atlantic Star* to fish for Atlantic mackerel and herring in the EEZ.

argued that, in fiscal years 1998 and 1999, the revocation of its permits "prohibited [American Pelagic's] use of the [*Atlantic Star*] for its intended operation in the Atlantic mackerel and herring fisheries of the United States, and any other fishery of the United States * * * and has taken the expected net revenues or profits [American Pelagic] would have earned and received from use and operation of the [*Atlantic Star*] * * *." *Id.* ¶¶ 57, 63; see also *id.* ¶¶ 60, 66 ("United States has taken, destroyed, and deprived [*American Pelagic*] of its compensable investment backed expectations in the use and operation of the ATLANTIC STAR * * * and has taken all economically viable use of the [*Atlantic Star*] * * *."); Br. Pl.-Appellee at 20-27.

American Pelagic asserted that there was either a categorical or a noncategorical regulatory taking. According to American Pelagic, a temporary categorical taking occurred because the revocation of American Pelagic's permits and authorizations deprived the *Atlantic Star* of all economically beneficial use during the takings period. In the alternative, American Pelagic contended that analysis of each of the Penn Central factors established that a temporary noncategorical regulatory taking occurred.

The Court of Federal Claims concluded that American Pelagic did in fact possess a property interest in the use of the *Atlantic Star* to fish in the Atlantic mackerel and herring fisheries in the EEZ, and that this right was taken by the revocation of its permits and authorization letter. *Am. Pelagic I*, 49 Fed.Cl. at 44-52. The court first determined that the Takings Clause applies to both tangible and intangible personalty. *Id.* at 45-46. It then turned to the matter of identifying the property interest allegedly taken: "In this case, from the standpoint of traditional property concepts, the *res* potentially taken by the government was the ship itself." *Id.* at 46. However, the court recognized that the *Atlantic Star* itself was not taken nor destroyed; rather,

restrictions were placed upon its use. *Id.* Relying on *Lucas* for the proposition that compensation is owed when government "so completely destroys the beneficial uses of property that it is, in effect idled," the court distilled the existence of a property interest to a single question: "[A]re the uses prohibited within the bundle of rights otherwise inherent in the vessel?" *Id.*

The court answered: "To determine whether a property right exists independent of the regulatory scheme, it is necessary to decide 'whether an independent or preexisting right of use under common law applies.' " *Id.* at 47 (quoting *Maritrans*, 40 Fed. Cl. at 796, and citing *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 217 (Fed.Cir.1993)). While acknowledging that the use of the *Atlantic Star* to fish in the EEZ was entirely dependent upon a regulatory scheme, the court emphasized that the use (fishing) was not inherently dangerous, a nuisance, or "totally a matter of governmental grace." *Id.* Thus, the court concluded that "the right to use is one of the group of rights inhering in the citizen's relation to [a] physical thing. Inherent in the ownership of vessels is the right to use them." *Id.* (internal quotation marks and citations omitted). The court thus distinguished the nondangerous use of the *Atlantic Star* for fishing in the EEZ from the use of spent plutonium for nuclear fission, *Allied-Gen. Nuclear Servs. v. United States*, 839 F.2d 1572 (Fed.Cir.1988), and the importation of semiautomatic assault rifles into the United States for sale, *Mitchell Arms*, 7 F.3d 212. *Am. Pelagic I*, 49 Fed. Cl. at 47. Finally, the court distinguished *Conti* on the ground that the restriction there was limited to a particular use of the claimant's boat (fishing for swordfish using drift gillnets) and did not, as the court found in this case, restrict all economically beneficial uses. Nor was there any allegation, as there is here, that Mr. Conti was being targeted by the legislation that banned the use of drift gillnets for swordfishing. *Id.* at 48. Accordingly, the court

concluded that because "[f]ishing as a livelihood is not a creation of the government * * * [American Pelagic] possessed a property interest in using its vessel to fish, albeit subject to the regulatory regime." *Id.*

Having found a cognizable property interest, the court went on to determine that each of the *Penn Central* factors was satisfied. *Id.* at 48-51. The court concluded that from the time the 1997 Appropriations Act was passed until the time that American Pelagic sold the *Atlantic Star*, the government "took [American Pelagic's] property interest in the use of its vessel to fish for Atlantic mackerel in the EEZ * * *." *Id.* at 51.

V.

A.

On appeal, the government challenges the grant of summary judgment on liability in favor of American Pelagic. The government starts from the premise that in order for a taking claim to succeed, what must be taken is one of the sticks in the bundle of rights that defines the owner's relationship to the *res*. From there, it argues that the Court of Federal Claims erred in holding that American Pelagic possessed a property interest in the use of the *Atlantic Star* to fish for Atlantic mackerel and herring in the EEZ, even subject to government regulation. The government urges that no property interest exists in an individual's investment in uses of personalty that are dependent upon discretionary permit issuances by the government. Br. Def.-Appellant at 22.

American Pelagic recognizes that one of the sticks in the bundle of property rights that the owner of property acquires with his title must be proscribed in order for a taking to occur. Br. Pl.-Appellee at 21-27; Supp. Br. Pl.- Appellee at 2. However, because the use of the *Atlantic Star* to fish was lawful not only under traditional property and nuisance

principles, *Lucas*, 505 U.S. at 1030, but also under the regulatory regime by which its permits were issued, American Pelagic argues that use of the vessel to fish for Atlantic mackerel and herring constituted a legally cognizable property interest. In contrast to *Mitchell Arms*, in which we explained that the ability to sell a firearm does not inhere in ownership of the firearm itself upon the owner's acquisition, American Pelagic asserts that the right to fish for Atlantic mackerel and herring in the EEZ did inhere in its ownership of the *Atlantic Star*.

Thus, the question we must answer is this: Was the right to fish for Atlantic mackerel and herring in the EEZ a legally cognizable property interest such that it was a stick in the bundle of property rights that American Pelagic acquired as the owner of the *Atlantic Star*? For the reasons that follow, we conclude that it was not. Consequently, American Pelagic's takings claim fails.

B.

We determine whether an asserted right is one of the rights in the bundle of sticks of property rights that inheres in a *res* by looking to "existing rules or understandings" and "background principles" derived from an independent source such as state, federal, or common law. *Lucas*, 505 U.S. at 1030 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972)).[16] These rights define the dimensions of the

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[16] The Court explained:

> [O]ur "takings" jurisprudence * * * has traditionally been guided by the understandings of our citizens regarding the content of, and the States power over, the "bundle of rights" that they acquire when they obtain title

(cont'd)

requisite property interest for purposes of establishing a takings claim. Significantly, the Supreme Court has distinguished personal property from real property:

> And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979).

Lucas, 505 U.S. at 1027. Thus, it is conceivable that the owner of personal property, as opposed to land, may have a lower expectation that he has a property interest in using his personal property for commercial dealings. Moreover, there is a distinction between simply not being disturbed in the particular use of one's property and having the *right* to that use of the property. Clearly, in order for there to be a cognizable property interest sufficient to support a takings claim, the latter must be true. Thus, simply because many commercial fishermen were not affected by the 1997, 1998, and 1999 Appropriations Acts and continued to fish for Atlantic mackerel and herring in the EEZ, it does not follow

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> to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pa. Coal Co. v. Mahon*, 260 U.S. [393,] 413 [(1922)].

Lucas, 505 U.S. at 1027.

that those fishermen had a *property interest* in the use of their vessels to fish in the EEZ. They simply were enjoying a use of their property that the government chose not to disturb. In other words, use itself does not equate to a cognizable property interest for purposes of a takings analysis.

C.

Up until the 1960s, most nations with coastlines, including the United States, had declared jurisdiction over territorial seas of three miles and conservation zones of twelve miles. See, *e.g.*, Bartlett Act, Pub. L. No. 88-308, 78 Stat. 194 (1964) (previously codified at 16 U.S.C. §§ 1081-86) (three-mile territorial sea jurisdiction); Pub. L. No. 89-658, 80 Stat. 908 (1966) (previously codified at 16 U.S.C. §§ 1091-94) (three-to twelve-mile conservation zone jurisdiction) (both repealed by the Magnuson Act, title IV, § 402(a), (b), 90 Stat. at 360). Similarly, prior to the enactment of the Magnuson Act, a state could regulate its state-registered vessels and its citizens while fishing in what is now the EEZ pursuant to a line of Supreme Court cases culminating in *Skiriotes v. Florida*, 313 U.S. 69 (1941). Countries generally attempted to achieve conservation of fish by entering into international fishing agreements (to approximately twenty of which the United States was a party). *See* S. Rep. No. 94-416, n.3, app. 1. In 1976, however, in response to the third session of the United Nations Convention on the Law of the Sea ("UNCLOS"), which provided for coastal nation management of resources within a two-hundred-mile zone, Congress enacted the Magnuson Act:

> Fishery conservation zone
>
> There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the

> seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

16 U.S.C. § 1811 (1976).

Subsequently, in a presidential proclamation, President Reagan established the EEZ and assumed sovereign rights for the United States over this two-hundred-mile zone. Quoting from UNCLOS, Dec. 10, 1982, art. 56, p 1, 21 I.L.M. 1245, 1280,[17] he announced:

> Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds * * *.

Proclamation No. 5030, 48 Fed.Reg. 10,605. It is clear from this language that, at least as of 1983, the United States had asserted sovereignty with respect to the exploration, exploitation, conservation, and management of the natural resources of the EEZ. This assertion of sovereignty was subsequently codified in the 1986 amendments to the Magnuson Act:

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[17] To date, the United States has not ratified UNCLOS.

> United States sovereign rights to fish and fishery management authority
>
> (a) In the exclusive economic zone. Except as provided in section 102 [16 USCS 1812], the United States claims, and will exercise in the manner provided for in this Act, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.
>
> (b) Beyond the exclusive economic zone. The United States claims, and will exercise in the manner provided for in this Act, exclusive fishery management authority over the following:
>
> (1) All anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation.
>
> (2) All Continental Shelf fishery resources beyond the exclusive economic zone.

Act of Nov. 14, 1986, Pub. L. No. 99-659, tit. I, § 101(b), 100 Stat. 3706, 3706-07 (codified as amended at 16 U.S.C. § 1811 (2000)). Thus, Congress explicitly assumed "sovereign rights and exclusive fishery management authority over all fish" in the EEZ. This assumption of sovereignty indisputably encompasses all rights to fish in the EEZ.

The various provisions of the Magnuson Act are consistent with this exercise of U.S. sovereignty over the EEZ and the fish and resources within it. Enacted to "take immediate action to conserve and manage the fishery resources found off the coast of the United States," 16 U.S.C. § 1801(b)(1), the Magnuson Act established national

standards by which fishery "conservation and management" plans would be developed, *id.* § 1851(a). Congress further established under the auspices of the Secretary Regional Fishery Management Councils, including the NEFMC and the MAFMC, with direct authority over the fisheries within their respective geographic regions. *Id.* § 1852. As noted above, each council is charged with the obligation, among others, of preparing and submitting FMPs for the fisheries within its authority. *Id.* § 1852(h). Congress required the FMPs to contain

> conservation and management measures * * * necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery * * *.

Id. § 1853(a)(1)(A). Significantly, the Magnuson Act bars foreign fishing in the EEZ entirely, except as the United States permits, *id.* § 1821, and authorizes the regional councils to require federal permits for U.S. fishermen to fish in any fishery within the EEZ, *id.* § 1853(b)(1). Thus, in addition to asserting U.S. sovereignty over the EEZ and the fish and resources therein, Congress also erected an elaborate framework by which the fisheries in the EEZ would be managed under the oversight of the Secretary.

Pursuant to the Magnuson Act, the "conservation and management of the EEZ" belongs to the sovereign, and this necessarily includes the right to fish in the zone. Moreover, there is no language in the statute to the effect that any fishing privileges that are granted pursuant to the Magnuson Act vest in their owners a property right protected by the Fifth Amendment. *See Foss*, 161 F.3d at 588 ("[T]he language of the Magnuson Act does not confer any claim of entitlement or property rights."); *see also Parravano v. Babbitt*, 861 F.Supp. 914, 928 (N.D. Cal. 1994) ("Thus, the

Magnuson Act confers on the Secretary of Commerce authority to manage the fishery resources in the EEZ for conservation. It does not confer on commercial fishermen any right or title in the fishery resources under the Department of Commerce's authority."), *aff'd*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

Because it was already in place by the time American Pelagic purchased the *Atlantic Star*, the Magnuson Act was an "existing rule" or "background principle[ ]" of federal law that inhered in American Pelagic's title to the vessel. *Lucas*, 505 U.S. at 1029-30. In the words of the Supreme Court, as far as ownership of the *Atlantic Star* was concerned, the sovereign rights of the United States in the EEZ "inhere[d] in the title itself, in the restrictions that background principles of the [federal government's] law * * * already place[d] upon * * * ownership." *Id.* at 1029 (discussing restrictions on real property). It was against this framework of existing federal restrictions on fishing in the EEZ that American Pelagic invested in the *Atlantic Star*. As of 1996, when the *Atlantic Star* was purchased, the Magnuson Act and the attendant regulatory scheme precluded any permitted fisherman from possessing a property right in his vessel to fish in the EEZ. The revocation of American Pelagic's permits, therefore, did not "go[ ] beyond what the relevant background principles would dictate." *Id.* at 1030.

The Magnuson Act is consistent with the historical role played by the sovereign, state or federal, with respect to its waters. As early as 1876, the Supreme Court concluded that

> [t]he principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running.

McCready v. Virginia, 94 U.S. 391, 394 (1876) (citations omitted); *see also, e.g., State v. Leavitt*, 105 Me. 76, 72 A. 875, 876 (1909) ("It is, therefore, settled law that each State, unless it has parted with title * * * owns the bed of all tidal waters within its jurisdiction, and as well, the tide waters themselves and the fish in or under them, so far as they are capable of ownership. * * * It is in fact a property right * * *.").

We are not persuaded by American Pelagic's contention that there exists a historical common law right to use vessels to fish in the EEZ that was not abrogated by the Magnuson Act. American Pelagic points to language in the Magnuson Act that Congress was authorizing "no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources * * *." 16 U.S.C. § 1801(c)(2). Plainly, rendering the ability to fish in the EEZ a matter of governmental permission, rather than a property right, is "necessary for the conservation and management of fishery resources * * *." *Id.* The language itself thus explicitly carves out from the "legitimate uses" those involved in the conservation and management of fishery resources. Additionally, the phrase "conservation and management" is broadly defined in the statute to include, *inter alia*, "all of the rules, regulations, conditions, methods, and other measures * * * which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment * * *." *Id.* § 1802(5) (2000). The right to use the *Atlantic Star* to fish for mackerel and herring unquestionably implicates the conservation and management of fishery resources. Accordingly, we conclude that the Magnuson Act directly assumes for the federal government sovereignty over the right to fish for Atlantic mackerel and herring in the EEZ. As American Pelagic itself notes, the Magnuson Act expressly

asserts the United States' "sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish" within the EEZ. *Id.* § 1801(b)(1). The statute does not explicitly, or implicitly, preserve any potentially pre-existing common law right to fish in the EEZ.[18]

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[18] American Pelagic points to the text of 43 U.S.C. § 1332(1), (2) (2000), which provides the United States with "jurisdiction, control, and power of disposition" over the subsoil and seabed of the outer Continental Shelf that underlies the waters of the EEZ. The statute states that "the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected * * *." Outer Continental Shelf Lands Act, Pub. L. No. 212, ch. 345, §§ 2(a), 3(b), 67 Stat. 462, 462 (1953) (codified as amended at 43 U.S.C. § 1332) ("OCSLA"). Citing *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979), American Pelagic contends that the Magnuson Act did not abrogate this congressional recognition of the right to fish in the EEZ. However, because it was enacted in 1953, more than twenty years prior to enactment of the Magnuson Act, OCSLA's intention not to affect the then-existing rights to navigation and fishing does not bear on the subsequent effect of the Magnuson Act. Moreover, the court in *Massachusetts v. Andrus* was not faced with the question of whether a property right to fish in the EEZ existed, but with the question of whether the Secretary of the Interior had authority to permit the sale of oil drilling leaseholds off the coast of New England. In *dicta*, the court did state that it was "unable to see that [the Magnuson Act] altered the meaning and purpose of [42 U.S.C. section 1332(2)], which had been directed at the legal right to fish rather than at prohibiting physical impediments." 594 F.2d at 889. Yet, the court also stated that the Magnuson Act is "thus no less an assertion of a federal interest in conserving the fishery resources in the waters of the Outer Continental Shelf than was the earlier Outer Continental Shelf Lands Act an assertion of a federal interest in developing the oil and gas wealth of the subsoil and seabed in the same area." *Id.* at 891. We do not think that OCSLA and *Massachusetts v. Andrus* help American Pelagic.

Neither are we persuaded by American Pelagic's reliance on President Reagan's Proclamation No. 5030, which states that the establishment of the EEZ "does not change existing United States policies concerning the continental shelf, marine mammals and fisheries * * *." 48 Fed. Reg. at 10,605. The short answer is that "existing United States policies" included those "policies" enshrined in the Magnuson Act itself, which predated Proclamation No. 5030.[19] In sum, no right to fish in the EEZ inhered in American Pelagic's title when it acquired the *Atlantic Star*. Because the right to use the vessel to fish in the EEZ was not inherent in its ownership of the *Atlantic Star*, American Pelagic did not suffer the loss of a property interest for purposes of the Takings Clause when its Atlantic mackerel and herring permits were revoked.

Our conclusion is consistent with *Mitchell Arms* and *Conti*. In the first case, Mitchell Arms, Inc. ("Mitchell Arms") filed suit in the United States Claims Court alleging that the decision of the Bureau of Alcohol, Tobacco, and Firearms to revoke permits allowing the importation and sale of semi-automatic assault rifles constituted a taking of its

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[19] American Pelagic also points to the statement in the fact sheet accompanying Proclamation No. 5030 that "The President has not changed the breadth of the United States territorial sea." American Pelagic's reliance on this statement is misplaced. The EEZ, as stated in Proclamation No. 5030, is an area "beyond the territory and territorial sea of the United States," 48 Fed. Reg. at 10,606, that now extends to twelve nautical miles from the baseline of the United States. Proclamation No. 5298, 54 Fed. Reg. 777 (Dec. 27, 1988). Even assuming it is to be accorded any measure of authoritative force, the statement in the fact sheet simply does not pertain to the assumption of sovereignty over fisheries in the EEZ pursuant to the Magnuson Act.

right to use the permits for those purposes. *Mitchell Arms*, 7 F.3d at 215. The Claims Court dismissed Mitchell Arms' complaint under its Rule 12(b)(4) for failure to state a claim upon which relief could be granted. *Id.* The court concluded that neither the permits themselves nor Mitchell Arms' expectations arising from the combination of the permits and its contract to purchase the firearms from a foreign party gave rise to a property interest for purposes of the Fifth Amendment's Takings Clause. *Id.* Mitchell Arms appealed the court's decision and we affirmed. In our decision, we characterized Mitchell Arms' claim as follows: "that a property interest was created when it agreed to purchase the firearms with an expectation of importing them under the issued permits." *Id.* We agreed with the Court of Federal Claims, however, that no taking had occurred, for we determined that Mitchell Arms had failed to assert a property interest protected by the Fifth Amendment. *Id.* at 215-17. We stated that the right to sell assault weapons in domestic commerce was not "a right inherent in plaintiff's ownership of [the] weapons." *Id.* (quoting *Mitchell Arms, Inc. v. United States*, 26 Cl.Ct. 1, 6 (1992)).

The plaintiff in *Conti* was Paul Conti, a swordfisherman. Mr. Conti was the owner of the *F/V Providenza*, a vessel that he used to fish for swordfish in the Atlantic Swordfish fishery using drift gillnets. Mr. Conti filed suit in the Court of Federal Claims alleging that the government's 1999 ban on harvesting swordfish using drift gillnets constituted a regulatory taking of his swordfishing permit, the *Providenza*, and his gillnet gear without just compensation, in violation of the Fifth Amendment. 291 F.3d at 1337. Mr. Conti contended that, while he still was in possession of his permit, the *Providenza*, and his gear, there had been taken from him the ability to use those things in a particular way: to fish for swordfish in the Atlantic Swordfish fishery using drift gillnets. *Id.* at 1340. The Court of Federal Claims dismissed

Mr. Conti's complaint for failure to state a claim upon which relief could be granted. The court determined, *inter alia*, that continued use of Mr. Conti's property for harvesting swordfish with drift gillnets did not constitute a compensable property interest. *See Conti v. United States*, 48 Fed. Cl. 532, 539 (2001) ("The ability to use gillnets to harvest swordfish is not a right inherent in holding a permit nor in the ownership of the gear or the vessel.").

Mr. Conti appealed the dismissal of his complaint, and we affirmed. We did so on two grounds. Relying on *Andrus v. Allard*,[20] we concluded that Mr. Conti's "continuing ability

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[20] The claimants in *Andrus* contended that federal regulations prohibiting the sale of parts of birds that were legally killed before the birds were protected by federal statute effected a taking of their bird artifacts. *Andrus*, 444 U.S. at 64. The Supreme Court disagreed:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

Id. at 65-66. The Court went on to explain that the fact that the regulations prevented the most valuable use of the claimants' property was not dispositive, and that a reduction in the value of property does not necessarily amount to a taking. *Id.* at 66. The Court stated that the loss of future profits, in the absence of any physical property restriction, "provides a slender reed upon which to rest a takings claim." *Id.*

to sell the vessel and the gear, fish in a different fishery, or put both the nets and vessel to other uses" precluded us from ruling that a regulatory taking had occurred. *Conti*, 291 F.3d at 1343. We also stated that Mr. Conti's takings claim failed "for an additional reason." *Id.* at 1345 n.8. After noting that Mr. Conti's ability to use his vessel and gear to catch swordfish using drift gillnets was dependent upon a revocable permit, we pointed out that his case was analogous to *Mitchell Arms*:

> In *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 217 (Fed. Cir. 1993), we rejected the claim that the Bureau of Alcohol, Tobacco, and Firearms' decision to revoke a permit allowing the importation and sale of certain firearms constituted a taking of the claimant's right to use the permit for those purposes. We stated: "Mitchell's ability to import the rifles and sell them in the United States was at all times entirely subject to the exercise of ATF's regulatory power. Consequently, any expectation which arose on Mitchell's part as a result of the import permits did not constitute a property right protected by the Fifth Amendment." 7 F.3d at 217. Likewise, the drift gillnet regulation at issue here has banned a particular use of Mr. Conti's vessel and gear "which was not inherent in its ownership" and was "totally dependent upon the * * * permit issued by" the government. *Id.*

Id.

Mitchell Arms and *Conti* control this case. What allegedly was taken in *Mitchell Arms* was the right to import firearms and sell them in domestic commerce. What allegedly was taken in *Conti* was the right to harvest swordfish in the Atlantic Swordfish fishery using drift gillnets. In each case, the takings claim failed because what allegedly was taken was not one of the sticks in the bundle of rights that inhered

in ownership of the underlying *res*: in *Mitchell Arms*, certain firearms; in *Conti*, a fishing vessel. American Pelagic is in the same situation as the plaintiffs in *Mitchell Arms* and *Conti*. As discussed above, because the Magnuson Act assumed sovereignty for the United States over the management and conservation of the resources located in the EEZ, and specifically over fishery resources, American Pelagic did not have, as one of the sticks in the bundle of property rights that it acquired with title to the *Atlantic Star*, the right to fish for Atlantic mackerel and herring in the EEZ. American Pelagic thus did not possess the property right that it asserts formed the basis for its takings claim. In the absence of that property right, its claim is fatally defective.[21]

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[21] American Pelagic argues that *Maritrans, Inc. v. United States*, 342 F.3d 1344, supports its assertion of a property interest in the right to fish for Atlantic mackerel and herring in the EEZ. We do not agree. *Maritrans* involved a statute requiring, *inter alia*, that all single hull tank vessels, including tank barges, engaged in the marine transportation of oil and petroleum products in the navigable waters of the United States be either retrofitted with double hulls or phased out of service. The plaintiff, Maritrans, Inc. ("Maritrans") alleged that the statutory requirement constituted a taking of eight of its single hull tank barges that it had either retrofitted, scrapped, or sold as a result of the legislation. *Id.* at 1348-50. Addressing the threshold inquiry of whether Maritrans possessed a property interest in its barges, we held that it did. *Id.* at 1353. We did not hold, however, that Maritrans had a property interest in the use of its vessels on the navigable waters of the United States. Although we noted the governments contention that the property interest Maritrans asserted was the use of its vessels on the navigable waters of the United States, *id.*, we did not approach the case in terms of such an asserted interest. Rather, we explained that like Mr. Conti, Maritrans had a property interest in the vessels themselves. *Id.* ("Martirans has various rights in its barges that qualify them as property for Fifth Amendment purposes."). We then determined that the legislation did not effect a categorical taking

(cont'd)

CONCLUSION

For the foregoing reasons, we reverse the holding of *American Pelagic I* that the revocation of American Pelagic's permits and authorization letter constituted a taking under the Fifth Amendment. We therefore vacate the award of damages in *American Pelagic II*. The case is remanded to the Court of Federal Claims with the instruction that it enter judgment in favor of the United States.

COSTS

Each party shall bear its own costs.

Reversed, Vacated, and Remanded

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of Maritrans vessels, *id.* at 1353-55, and further, pursuant to the *Penn Central* analysis, that Maritrans did not suffer a noncategorical taking of its vessels, *id.* at 1356-59.

APPENDIX B

In the United States Court of Federal Claims

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Plaintiff,

v.

The UNITED STATES, Defendant.

No. 99-119C.

April 4, 2001.

OPINION

BRUGGINK, Judge.

This is an action founded upon the Takings Clause of the Fifth Amendment to the United States Constitution. Plaintiff asserts that the enactment of legislation resulted in a temporary taking of plaintiff's fishing vessel. Pending are plaintiff's and defendant's cross-motions for summary judgment. Oral argument was held on November 21, 2000. After oral argument, the court requested supplemental briefing. For the reasons set forth below, plaintiff's motion is granted, and defendant's motion is denied.

FACTUAL BACKGROUND[1]

Plaintiff American Pelagic Fishing Company, L.P., ("APFC")[2] is a limited partnership that invested nearly $40

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[1] The relevant facts of this case are undisputed and are contained in plaintiff's proposed findings of fact and supporting appendices. Defendant stated that it was unable to respond to certain of plaintiff's proposed facts regarding the economic impact of the congressional legislation at issue here. It did not, however, request additional discovery under Rule of the Court of Federal Claims 56(g) because counsel believed that economic discovery had been prohibited. This was based on the following statement by the court at a prior oral argument: "If you say you need discovery or the Government does, and I'm talking about things other than damages, then I would hope you all could reach some agreement." Tr. Dec. 14, 1999, Oral Arg. at 75. This statement did not foreclose all economic discovery; the only discovery perhaps foreclosed by the court's statement was discovery relating solely to damages. The relevance of the economic impact of the legislation in question here is not limited to damages. The economic impact of the legislation is part of the liability inquiry in a regulatory takings case. Defendant could have responded, either substantively or by requesting additional discovery. Without either of these actions, the facts alleged by plaintiff regarding the economic impact of the legislation on its property are deemed established for purposes of determining liability. *See* Rule of the Court of Federal Claims 56(d)(3); *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1561 (Fed. Cir. 1988); *Carolina Power & Light v. United States*, 48 Fed.Cl. 35, 41 n.4 (2000). We note, in any event, that if plaintiff in fact suffered no economic impact, it will not be able to prove damages.

We also note that we do not rely on paragraph 7 of the Supplemental Declaration of Lisa A. Kohlwes Torgersen. That paragraph improperly contains legal argument. It is hereby stricken from the record.

[2] APFC's immediate predecessor as owner of the Atlantic Star is the Atlantic Star Fishing Company. The owners of the Atlantic Star Fishing Company created APFC to finance the Atlantic Star project. For (cont'd)

million in a fishing vessel, a freezer trawler named the *Atlantic Star*, for the purpose of fishing for Atlantic mackerel and herring in the Exclusive Economic Zone ("EEZ") of the United States.[3] The *Atlantic Star*, a United States flag vessel when owned by plaintiff, was 369 feet in length and weighed over 6,900 gross tons. Each of its two engines was capable of producing 6,700 horsepower. The *Atlantic Star's* size enabled it to contain a larger cold storage facility than other participants in the Atlantic mackerel and herring fisheries. Its size did not, however, mean that it was capable of catching more fish than smaller vessels; a vessel's size does not have a direct relationship to the amount of fish that the vessel can catch. APFC planned to use the *Atlantic Star* to harvest Atlantic mackerel from December to May of each year and to harvest Atlantic herring year-round. Plaintiff expected the *Atlantic Star* to catch approximately 50,000 metric tons of fish per year.

Prior to purchasing the *Atlantic Star*, plaintiff researched the east coast Atlantic mackerel and herring fisheries. Plaintiff's research included consulting various government publications, in particular a study conducted by the United States International Trade Commission ("ITC") entitled "Mackerel: Competitiveness of the U.S. Industry in Domestic and Foreign Markets." The ITC study resulted from a request by the Senate Finance Committee, which was

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the sake of simplicity, the term "plaintiff" in this opinion shall include both APFC and the Atlantic Star Fishing Company.

[3] The Atlantic Star was acquired by plaintiff on November 14, 1996. The vessel underwent conversion and outfitting work in 1997, with the work being completed in November of that year. On July 6, 1999, plaintiff sold the Atlantic Star to its Dutch lenders.

concerned about the lack of development of the United States Atlantic mackerel resource. The ITC concluded, among other things, that the use of larger fishing vessels would offer economies of scale and would improve the competitive position of the United States Atlantic mackerel industry. Plaintiff relied on this study in developing the *Atlantic Star* project.

Plaintiff's considerations took place against the backdrop of the regulatory scheme governing the Atlantic mackerel and herring fisheries. Beyond state waters, out to the 200-mile limit of the EEZ, the federal government manages fishery resources. The federal regulatory scheme was established by the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. §§ 1801-1883 (1994 & Supp. III 1997).[4] The Magnuson Act confers primary federal management authority over marine fishery resources on the Secretary of Commerce and the National Marine Fisheries Service ("NMFS"), a subunit of the National Oceanic and Atmospheric Administration ("NOAA") within the United States Department of Commerce. Integral in the management of the fisheries within the EEZ are eight regional fishery management councils. These councils are charged with developing fishery management plans in accordance with national standards set forth in 16 U.S.C. § 1851. Once developed and approved by the Secretary of Commerce, a Fishery Management Plan ("FMP") is then promulgated by the NMFS. The relevant councils here are the Mid-Atlantic Fishery Management

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[4] In this opinion, all citations to the United States Code and the Code of Federal Regulations are to those codes as they existed in 1997.

Council ("MAFMC") and the New England Fishery Management Council ("NEFMC"). The MAFMC has management responsibility for Atlantic mackerel, and an FMP was in place for Atlantic mackerel at the time plaintiff was seeking entry to that fishery. The NEFMC has management responsibility for Atlantic herring. An FMP was not in place for Atlantic herring at the time plaintiff sought entry to that fishery.

For several years prior to plaintiff's development of the *Atlantic Star* project, the NMFS had been making public statements that the herring and mackerel stocks were at high abundance levels and low levels of exploitation. Additionally, several documents published by the MAFMC in the years leading up to the *Atlantic Star* project discussed the need for large fishing vessels in the east coast industry. Each of these documents contained the following passage, relied upon by plaintiff in developing the *Atlantic Star* project:

> The key problem for the U.S. fishery remains that of Atlantic mackerel not being a desirable fish in the eyes of most American consumers, and transportation costs have been prohibitive in shipping this low-value, bulk product to foreign markets where it enjoys greater acceptance. In order to compete in the world bulk market, the U.S. industry will have to emulate its foreign competitors, which harvest, process and ship mackerel in large quantities to take advantage of economies of scale. * * * Currently the U.S. east coast industry does not have the large vessels necessary to participate in this market * * *.

In addition, in 1994 the NMFS had rescinded an earlier control date for the Atlantic mackerel fishery. The control date of August 13, 1992, had been intended to "preclude speculative entry into the mackerel fishery" by placing future entrants to the fishery on notice that they would not be

guaranteed future access to the Atlantic mackerel fishery should a management regime be implemented. 57 Fed. Reg. 36,384 (Aug. 13, 1992). This control date was rescinded on September 27, 1994, because the MAFMC no longer believed "that the Atlantic mackerel fishery will require the imposition of some type of limited-entry management system." 59 Fed. Reg. 49,235 (Sept. 27, 1994).[5]

For the years the *Atlantic Star* would have participated in the Atlantic mackerel and herring fisheries, the MAFMC proposed, and the NMFS approved, an Allowable Biological Catch ("ABC") for the Atlantic mackerel fishery. For Atlantic mackerel, the ABC for 1997 was 1,178,000 metric tons; the ABC for 1998 was 382,000 metric tons; and the ABC for 1999 was 383,000 metric tons. These limits were based on the best scientific information available to the NMFS. The United States commercial landings of Atlantic mackerel in the years listed were as follows: 15,706 metric tons in 1997, 12,513 metric tons in 1998, and 12,050 metric tons in 1999.

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[5] Plaintiff alleges that it relied on the rescission of the control date for Atlantic mackerel when making its decision to invest in the *Atlantic Star*. Pl.'s Proposed Findings ¶ 54. However, this proposed finding cites only to a paragraph of the complaint, ¶ 30, that was denied by defendant. Furthermore, there is no documentary evidence supporting this finding. Pursuant to Rule of the Court of Federal Claims 56(d)(3), this court cannot deem a fact established that is not "adequately supported." This support cannot come from a party's own pleading. Rule of the Court of Federal Claims 56(d)(1) ("Each paragraph [of the Proposed Findings of Uncontroverted Fact] shall contain citations to the opposing party's pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.").

In its draft FMP for the Atlantic herring fishery,[6] the NEFMC has proposed an ABC of 300,000 metric tons. The United States commercial landings of Atlantic herring for the past several years were as follows: 89,415 metric tons in 1996, 95,715 metric tons in 1997, and 81,512 metric tons in 1998.

Plaintiff relied on these figures in making its decisions regarding the *Atlantic Star* project. As a result of its research, plaintiff concluded that an investment in the Atlantic mackerel and herring fisheries would be reasonable, low risk, and profitable. Consequently, plaintiff purchased the *Atlantic Star* and set about converting the vessel in Norway for use in the Atlantic mackerel and herring fisheries of the EEZ.

Plaintiff also applied for the necessary fishery permits and gear authorizations. Under 50 C.F.R. § 648.4(a)(5), a fishing vessel must have and carry on board a valid Atlantic mackerel permit in order to fish for, possess, or land Atlantic mackerel in or from the EEZ. Under 50 C.F.R. § 648.4(e)(1), the Regional Administrator for NMFS must issue the permit within 30 days of receipt of the application. Additionally, because of the possibility that Northeast Multispecies (Nonregulated) fish might be caught as incidental by-catch, plaintiff applied for a Northeast Multispecies (Nonregulated) permit. Finally, vessels harvesting Atlantic mackerel and herring in the Gulf of Maine/Georges Bank Regulated Mesh Area with midwater trawl gear of mesh size less than that normally required by the regulations were required to carry

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[6] This draft FMP was partially approved by the Secretary of Commerce on October 27, 1999.

on board an authorization letter issued by the Regional Administrator pursuant to 50 C.F.R. § 648.80(d).

The fishing permits were initially issued by the Northeast Regional Office of NMFS to the vessel as owned by the Atlantic Star Fishing Company on February 5, 1997, and were re-issued to the vessel as owned by APFC on April 8, 1997, and April 12, 1997, after ownership of the vessel had passed to APFC. The permit number remained the same after transfer, and the permits granted were the following:

1. Federal Fisheries Permit # 610018, for Atlantic mackerel and *Illex* squid and for incidental *Loligo* squid and butterfish, with an expiration date of December 31, 1997; and

2. Federal Fisheries Permit # 610018, for Northeast Multispecies (Nonregulated), with an expiration date of April 30, 1998.

On August 28, 1997, the regional office of NMFS also issued to the *Atlantic Star* a Gulf of Maine/Georges Bank Midwater Trawl Gear Authorization letter for Atlantic herring, blueback herring, mackerel, and squid. The letter had an expiration date of April 30, 1998.

As news of the *Atlantic Star* project spread, local commercial opposition to the vessel's entry into the Atlantic mackerel and herring fisheries began to form. At a joint meeting of the Atlantic Herring Section and the NEFMC Herring Committee in March 1997, potential restrictions on vessel specifications were discussed. The concern about the *Atlantic Star* was obvious. One attendee at the joint meeting stated, "There's a U.S. boat in Norway that will have a 300 ton daily capacity. There's room for growth in the herring and mackerel fishery but not this much growth and not at this pace without severely impacting the current herring and mackerel fishery. We need to keep this fishery local." A motion was made to discuss, at the next meeting, placing a

limit of 150-160 feet and 2500 horsepower on fishing vessels. To this motion, one of the meeting's participants responded that a limit of 170 feet and 3000 horsepower would be a "good limit" because he was refitting a 165 foot boat for participation in the fishery.

The concerns expressed at the March 1997 Joint Meeting were echoed in H.R. 1855, introduced in the United States House of Representatives on June 10, 1997. This bill proposed to establish a moratorium on large fishing vessels in the Atlantic mackerel and herring fisheries. A large fishing vessel was defined as "a fishing vessel * * * of the United States that is equal to or greater than 165 feet in length overall and has an engine of more than 3,000 horsepower." Hearings on the bill were held on June 26, 1997, before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans. The *Atlantic Star* project was specifically discussed at these hearings. *See Fish and Wild Life Issues: Hearing on H.R. 1855 Before the House Subcomm. on Fisheries Conservation, Wildlife and Oceans*, 105th Cong. (1997). Michael Love, general manager of the *Atlantic Star*, testified against the bill and stated that, to the best of his knowledge, plaintiff owned the only vessel "that would be kept out by the bill in its present form." *See id.* at 1997 WL 11234446. The bill passed the House on July 28, 1997.

In September 1997, the NMFS announced a new control date for the Atlantic mackerel fishery. The control date was issued to provide notice to anyone "entering the commercial Atlantic mackerel fishery after September 12, 1997," that they would "not be assured of future access to the Atlantic mackerel resource in Federal waters if a management regime is developed and implemented" under the Magnuson Act. 62 Fed. Reg. 48047 (Sept. 12, 1997). "The potential eligibility criteria [in the future might] be based on historical participation [in the fishery], defined as any number of trips

having any documented amount of Atlantic mackerel landings." *Id.* The rationale given for the new control date was as follows:

> Discussion of reinstatement of a control date was prompted by news that a large factory trawler[7] was undergoing conversion to enter this fishery. Council members noted that, although the fishery is currently underexploited, a substantial increase in exploitation could be effected in a short period of time by the introduction of a factory trawler fleet. To prevent overcapitalization, Council members expressed the need to implement a management program for this fishery that allowed for controlled expansion * * *. The Council members noted that [the existing capital in the fishery], along with the possible addition of factory trawlers, raised concerns because the current estimate of long-term potential yield for this fishery is 150,000 [metric tons]. Further, both NMFS and the Council have indicated that first preference for entry into this fishery should be afforded to Northeast region vessels as an alternative to traditional fisheries that have been severely overfished.

Id.[8]

Also in September 1997, a bill paralleling H.R. 1855 was introduced in the United States Senate. That bill, S. 1192,

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[7] To be precise, the *Atlantic Star* was not a factory trawler; it was a freezer trawler. A freezer trawler only freezes the fish it catches; it does not otherwise process them.

[8] At the time this lawsuit was filed, no rule had been adopted limiting access to the fishery.

provided for the revocation of Atlantic mackerel or herring permits that had been issued to vessels "165 feet in length or longer" or possessing "an engine or engines capable of producing a total of more than 3,000 horsepower." In introducing the bill, Senator Olympia Snowe, although not naming the *Atlantic Star*, undoubtedly spoke of the vessel when referring to the "369 foot factory trawler" entering the Atlantic mackerel and herring fisheries as a "dramatic new proposal * * * which could alter the planned course of sustainable development for these fisheries." 143 Cong. Rec. S9637-01, S9644 (Sept. 18, 1997).

Neither H.R. 1855 nor S. 1192 was enacted into law. In fact, the NMFS and NOAA questioned the wisdom of legislatively revoking plaintiff's permits; the general position of the NMFS was that the regional fishery management councils were the appropriate entities to consider limits on fisheries permits.

Nevertheless, Congress achieved the purpose of H.R. 1855 and S. 1192 through a rider attached to the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. 105-119, which was enacted on November 26, 1997 ("1997 Appropriations Act"). Section 616 of the 1997 Appropriations Act provided as follows:

> (a) None of the funds made available in this Act may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length or of more than 750 gross registered tons, and that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower—
>
> (1) as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, and the authorization required under part 648.80(d)(2) of

> title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.); or
>
> (2) that would allow such a vessel to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States (except territories), unless a certificate of documentation has been issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997 and such fishery endorsement was not surrendered at any time thereafter.
>
> (b) Any fishing permit or authorization issued or renewed prior to the date of the enactment of this Act for a fishing vessel to which the prohibition in subsection (a)(1) applies that would allow such vessel to engage in fishing for Atlantic mackerel or herring (or both) during fiscal year 1998 shall be null and void, and none of the funds made available in this Act may be used to issue a fishing permit or authorization that would allow a vessel whose permit or authorization was made null and void pursuant to this subsection to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States.

The rider, in short, retroactively cancelled plaintiff's existing permits and authorization letter and prospectively precluded re-issuance of such permits. It is undisputed that the only immediate impact of the rider was to invalidate the *Atlantic Star*'s current fishing permits. No other vessels were affected by the legislative revocation.

An identical provision, applicable to the following fiscal year, was enacted on October 21, 1998, as § 617 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, Pub. L.

105-277 ("1998 Appropriations Act"). Finally, on May 21, 1999, Congress enacted § 3025 of the 1999 Emergency Supplemental Appropriations Act, Pub. L. 106-31, ("1999 Appropriations Act") which amended § 617 of the 1998 Appropriations Act and made the vessel-size limitation and permit revocation permanent:[9]

> Section 617 of [the 1998 Appropriations Act] is amended—
>
> (1) by striking subsection (a) and inserting the following:
>
> "(a) None of the funds made available in this Act or any other Act hereafter enacted may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length, of more than 750 gross registered tons, or that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, part 648.12 of title 50, Code of Federal Regulations, and the authorization required under part 648.80(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16

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[9] In the time since this lawsuit was filed, the MAFMC and NEFMC have recommended, and the NMFS has promulgated, regulations reflecting the statutory prohibition. *See* 64 Fed. Reg. 57587-01 (Oct. 26, 1999) (imposing vessel-size limitations on vessels engaged in the Atlantic mackerel fishery); 65 Fed. Reg. 77450 (Dec. 11, 2000) (imposing vessel-size limitations on vessels engaged in the Atlantic herring fishery).

U.S.C. 1801 et seq.), unless the regional fishery management council of jurisdiction recommends after October 21, 1998, and the Secretary of Commerce approves, conservation and management measures in accordance with such Act to allow such vessel to engage in fishing for Atlantic mackerel or herring (or both).."; and

(2) in subsection (b), by striking "subsection (a)(1)" and inserting "subsection (a)".

This legislative approach to the revocation of fishery permits and authorization letters was unique. Never before had the NMFS revoked a fishery permit in response to a Congressional appropriation act. Congress did not consult with United States fishery officials before deciding to nullify the *Atlantic Star*'s permits or ask those officials to recommend or consider alternatives. Congress did not ask the NMFS what its opinion would be regarding the revocation of a fishing permit by act of Congress. The size thresholds established by the legislation were developed by Congress and not by the NMFS. Furthermore, in a deposition taken in this case, the government's own stock assessment scientist for Atlantic mackerel and herring stated that the *Atlantic Star*'s entry into the Atlantic mackerel and herring fisheries would have had no negative impact on either species.

Congress's action also differed from previous legislative programs to reduce fishing capacity. In the past, the government has paid owners when it sought to obtain their permits and remove their vessels from fishing. For example, a fishing capacity reduction program was created by the Sustainable Fisheries Act, Pub. L. 104-297, enacted on October 11, 1996. This legislation authorizes the Secretary of Commerce to pay the owner of a fishing vessel if the vessel is withdrawn from a particular fishery; it also authorizes the Secretary to pay the owner of a fishing permit

if the permit is surrendered for permanent revocation. Pursuant to this legislation, the Secretary of Commerce may implement a fishing capacity reduction program if certain statutory criteria are met; these criteria include finding that the program is necessary to "prevent or end overfishing," finding that the program is consistent with the "Federal or State fishery management plan," and finding that the program is "cost-effective." 16 U.S.C. § 1861a(b)(1). This reduction program is voluntary, and its objective is "to obtain the maximum sustained reduction in fishing capacity at the least cost and in a minimum period of time." 16 U.S.C. § 1861a(b)(2). Plaintiff was aware of this prior practice. The legislation revoking the *Atlantic Star*'s permit and authorization letter was not voluntary and did not provide for any compensation to the owners.

The *Atlantic Star* was the only vessel to have its Atlantic mackerel permit and gear authorization letter revoked because of the 1997 Appropriations Act. Because of the revocation of its Atlantic mackerel permit, the *Atlantic Star* could not lawfully participate in the Atlantic mackerel fishery from the beginning of December 1997 until July 1999 when plaintiff sold the *Atlantic Star*. Furthermore, because of the prohibition on issuing any other fishing permits, the *Atlantic Star*, during this period, could not participate in any other United States fisheries in the EEZ for which permits were required. But for the revocation of its permit and authorization letter by these enactments, the *Atlantic Star* would have fished for Atlantic mackerel and herring in 1997, 1998, and 1999. No regulations of general application were promulgated in 1997 or 1998 that would have prevented the *Atlantic Star* from fishing for Atlantic mackerel if its fisheries permit had not been rendered null and void by Congress.

With the *Atlantic Star* unable to participate in the fisheries for which it was intended or in any other fisheries in

the EEZ requiring a permit, the economic value of the vessel was dramatically reduced. Although, even after the enactment of the 1997 Appropriations Rider, the *Atlantic Star* could have fished solely for Atlantic herring in non-closed waters with midwater trawl gear, it would not have earned a profit doing so. The profitability of the *Atlantic Star* depended upon its ability to fish for Atlantic mackerel, with or without the gear authorization letter.[10] There are no fisheries in existence in waters of the United States not requiring a fishery permit in which the *Atlantic Star* could have participated on a profitable basis.[11] Furthermore, there are no commercially-marketable fish beyond the 200 mile limit of the EEZ that can be economically harvested by a pelagic mid-water trawler such as the *Atlantic Star*. The *Atlantic Star* had the capability to fish in foreign waters but not on an economically viable basis. The *Atlantic Star* was a United States flagged vessel and, as such, could not participate in foreign fisheries without purchasing fishing rights. These foreign fishing rights are typically very

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[10] For this reason, the use the court shall consider in its analysis is the use of the *Atlantic Star* to fish for mackerel.

[11] Defendant did not agree with this proposed finding and stated, "There were other fisheries within the EEZ of the United States which the *Atlantic Star* could have fished without a permit or gear authorization." Def.'s Stmt. Genuine Issues ¶ 152. This statement is non-responsive to plaintiff's proposed finding. Plaintiff did not allege that there were no fisheries available to it at all; rather, it alleged that there were no fisheries available to it in which it could make a profit. Plaintiff supported this statement with the Declaration of Lisa A. Kohlwes Torgersen. Consequently, defendant has failed to identify a genuine dispute regarding this fact.

expensive. Furthermore, reflagging the vessel in a foreign country would have permanently barred the *Atlantic Star* from ever participating in American fisheries as a United States flagged vessel.

Plaintiff could not convert the *Atlantic Star* to any non-fishing use because of the specialized fishing and freezing equipment on board the vessel. Conversion would have required the removal of this equipment, and this removal only could have been accomplished at a high cost. Additionally, removal of this freezing equipment would have destroyed the value of the vessel and the investment plaintiff made in it. Plaintiff would no longer have had a fishing vessel, and nothing would have been left of the investment in the vessel for the purpose of fishing.

In response to the revocation of its permit and authorization letter, plaintiff filed a lawsuit in the U.S. District Court for the District of Columbia, challenging the constitutionality of the government's action and seeking a preliminary injunction against enforcement of the appropriations provisions. The district court denied the request for a preliminary injunction. On March 9, 1999, plaintiff filed this lawsuit alleging an uncompensated taking. On July 9, 1999, plaintiff sold the vessel to its Dutch lenders. On November 29, 1999, the district court action was dismissed as moot because plaintiff no longer owned the *Atlantic Star*. This court must now determine whether the Fifth Amendment's Takings Clause provides a basis for granting plaintiff relief.

DISCUSSION

The Fifth Amendment to the United States Constitution prohibits the federal government from taking private property without just compensation. This is not an abstract guarantee. It is an immensely practical device to protect the rights of the individual when faced with collective action. In this

connection, the present facts are deeply disturbing. It is undisputed that plaintiff's owners undertook, virtually at government invitation, to invest substantial resources in the vessel. They did everything required of them at the time to comply with the existing regulatory regime to ensure that the *Atlantic Star* could be used for commercial fishing. Congress put those regulations in place and entrusted to the NMFS their enforcement, including the ground rules for possible revocation. Although the court has misgivings about the rationale for what Congress then did, it will be assumed that Congress had good and sufficient reasons for revoking only the *Atlantic Star*'s permits, and thereby making the regulatory scheme uniquely unavailable to the vessel. The impact was the same. The investment, reasonably undertaken under the circumstances, was compromised in an instant. What makes the facts particularly troublesome is that, under existing precedent, it is far from clear that the Takings Clause is implicated. If that is the case, however, the result would undermine fundamental assumptions as to the government's rights vis a vis private property.

As nothing was physically taken or destroyed, plaintiff asserts a regulatory taking of personal property. The beginning of the application of the Takings Clause to other than physical takings is often traced to Holmes's observation that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). He pointed out that "[w]hen this seemingly absolute protection [the Takings Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* From this, the Court has held that land use regulation will constitute a taking if it "denies an owner

economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

This regulatory takings analysis has frequently been tested in the context of the regulation of real estate. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The rule is relatively clear. If the regulation destroys *all* economically viable use of the land, *i.e.*, if the owner has been "called upon * * * to leave his property economically idle," there is a compensable taking *per se*. *Lucas*, 505 U.S. at 1019. If the destruction of use is less than complete, the court engages in an "essentially ad hoc, factual inquiry" that includes analysis of three factors: the extent to which the governmental action interferes with distinct, investment-backed expectations; the character of the governmental action; and the extent of economic impact on the claimant. *Penn Cent.*, 438 U.S. at 124. As the Court explained in *Penn Central*, the focus in less-than-total destruction of use claims is "on the uses the regulations permit." *Id.* at 131.

The *Penn Central* analysis for identifying a regulatory taking also has been applied in the context of personalty. In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court used the three-part analysis when considering a prohibition on the sale of Indian artifacts containing eagle feathers. It held that "the denial of one traditional property right does not always amount to a taking. At least where the owner possess a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* at 65-66. In the circumstances, it found that the prohibition on use was not complete, nor was "it clear that appellees [would] be unable to derive economic benefit from the artifacts." *Id.* at 66.

In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court launched the *Penn Central* three-part

regulatory takings analysis into new waters: intangible personalty. That case involved the legislative creation of an obligation to private third parties, in a way arguably inconsistent with prior contract rights and obligations. The court rejected the takings claim, concluding that the Fifth Amendment is not implicated merely because Congress chooses to require one person to benefit another. The government had not occupied or destroyed the employer's property, the penalty for withdrawal was not out of proportion to the company's experience with the plan, and pension plans had long been subject to regulation. *Id.* at 226-27.

A more recent claim of regulatory taking involving intangible personalty is *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). A plurality of the Court applied the Takings Clause to strike down (rather than require compensation for) legislation that, in the majority's view,[12] created a liability from one private entity to another based on past actions. In short, the legislation was retroactive in effect. It created financial obligations in companies presently or previously engaged in coal mining to present or former employees or their families.

The plurality begins its analysis with a recognition that the Takings Clause has potential application to economic regulation affecting personalty. *Eastern Enterprises*, 524 U.S. at 523. It then calls attention to the relevance of the "justice and fairness" of the governmental action in

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[12] Justice Kennedy created a majority in remedy by agreeing that the retroactive nature of the liability was problematic, though because of the Due Process Clause rather than the Takings Clause.

determining whether a taking has occurred. *Id.* (citing *Andrus*, 444 U.S. at 65. In implementing that inherently factual and ad hoc inquiry, the plurality uses the three *Penn Central* factors. *Id.*

Positing the power of Congress to "adjust the burdens and benefits of economic life," *id.* at 524 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (a challenge based on due process)), the plurality nevertheless concluded that "[o]ur decisions have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of persons that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience." *Id.* at 528-29. In applying these factors, the plurality used the familiar *Penn Central* template to conclude that the medical benefits legislation at issue constituted a taking: the economic impact, while not confiscatory, was "substantial"; the plaintiff had good reason not to anticipate the imposition, thus it had a reasonable, investment-backed expectation that the retroactive legislation would not have been adopted; and finally, the targeted nature of the legislation made the character of the government action appear to be a taking.

Justice Kennedy disagreed with the takings analysis because he could find no clearly identified, traditional, property interest. *Id.* at 544 (Kennedy, J., concurring in the judgment and dissenting in part). He believed the legislation to be constitutionally defective, however, on due process grounds, because the remedy imposed by the legislation bore no legitimate relationship to the interests asserted by the government in its support. He, too, was troubled by the retroactive, targeted nature of the legislation. *Id.* at 549.

From these decisions, we deduce that the Takings Clause has applicability to both tangible and intangible personalty.

The relevant test for a regulatory taking in such circumstances is the now-traditional *Penn Central* three part analysis. Despite the plurality in *Eastern Enterprises*, however, what has not changed is the need to identify the "property" allegedly taken for public use, because the Takings Clause only protects juridically recognized property interests. *See M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995). In this case, from the standpoint of traditional property concepts, the *res* potentially taken by the government was the ship itself. Licenses or permits are traditionally treated as not protected by the Takings Clause because they are created by the government and can be cancelled by the government and normally are not transferrable.

The *Atlantic Star, qua* ship, plainly constitutes property for Fifth Amendment purposes, as the government concedes. Here, however, the owner was left with the ship; it was not physically taken. Instead, restrictions merely were placed on its use. That is not fatal to a takings claim, however. As evident from *Lucas*, the Fifth Amendment contemplates that compensation is owed when government, by regulation, so completely destroys the beneficial uses of property that it is, in effect, idled. This focus on the vessel thus distinguishes the facts from cases dealing with claims that the permits at issue were property in themselves. *See Bradshaw v. United States*, 47 Fed.Cl. 549, 553 (2000) ("A grazing permit * * * was never intended to become a property right."); *Hage v. United States*, 35 Fed.Cl. 147, 171 (1996) ("reliance on the privilege to graze * * * [cannot] create a property interest."). The question in this case thus becomes: are the uses prohibited within the bundle of rights otherwise inherent in the vessel?

As this court noted in a takings case involving the use of vessels to carry oil and hazardous substances: "The inquiry is not so simple as examining whether the Government

prevents the exercise of a property right by regulating it, transforming the property right into one 'totally dependent' on the Government's regulatory regime. That is a tautology; the inquiry is considerably more nuanced." *Maritrans, Inc. v. United States*, 40 Fed.Cl. 790, 796 (1998). To determine whether a property right exists independent of the regulatory scheme, it is necessary to decide "whether an independent or preexisting right of use under common law applies." *Id.* at 798; *see also Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 217 (Fed. Cir. 1993).

The relevant stick in the bundle in this context is the right to use the *Atlantic Star* to fish, subject to regulation. The government argues that the use of the vessel to fish in the EEZ was entirely dependent upon the government's regulatory scheme. We can assume for argument's sake that the government's assertion is correct without terminating the analysis. To say that the plaintiff's rights to fish were subject to a pervasive regulatory scheme—plainly they were—is not to say that nothing the government did with respect to those rights could ever implicate the Takings Clause.

We are not confronted here with a property or a use which is inherently dangerous or a nuisance. There is nothing in the nature of a fishing vessel that suggests that any use is totally a matter of governmental grace. This distinguishes the facts at the outset from cases cited such as *Mugler v. Kansas*, 123 U.S. 623 (1887), and *Miller v. Schoene*, 276 U.S. 272 (1928). Absent such a built-in limitation, personal property, like land, comes with an inherent right of use. We note that the right to use is one of the "group of rights inhering in the citizen's relation to [a] physical thing." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); *see also Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998) (identifying the right of use as one

of the "classical property rights"). As this court has held, "Inherent in the ownership of vessels is the right to use them." *Maritrans*, 40 Fed.Cl. at 799.

The nature of the use involved—fishing—also distinguishes this case from two other decisions relied on heavily by defendant. The Federal Circuit in *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir. 1988), found no taking where the government, in light of a Presidential ban on the recycling of spent plutonium, refused to issue an operating license to a plant designed for that purpose. The ban was issued in the interest of national security, and the court held that the Fifth Amendment provided no protection to one "who proposed use of property injurious to common defense." *Allied-General*, 839 F.2d at 1576.

Mitchell Arms, Inc. v. United States, 26 Cl. Ct. 1 (1992), aff'd, 7 F.3d 212 (Fed. Cir. 1993), concerned the suspension of import licenses for semiautomatic, assault-type rifles. The suspension of these licenses resulted in the plaintiff's loss of "the opportunity to sell the assault rifles in their original configuration." *Mitchell Arms*, 26 Cl.Ct. at 4. The plaintiff alleged that loss of this opportunity amounted to a taking without just compensation. This court rejected the argument, finding that the "right to sell assault weapons in domestic commerce [ ] is not a right inherent in plaintiff's ownership of those weapons." *Id.* at 6.[13]

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[13] *Mitchell Arms* distinguished *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), in which the court had found a taking of a right to mine uranium. The *Mitchell Arms* court recognized that the right to mine was "inherent in the ownership rights that United

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Fishing, however, can hardly be equated to "the novelty of nuclear fission" and "the fearsome effect of its use in war," *Allied-General*, 839 F.2d at 1577, or to the importation of assault rifles. Fishing and fission only sound alike. The use claimed—fishing—is not as transparently a matter of official grace. For that reason, the present facts are more akin to decisions dealing with what expectations can accrue in a "highly regulated" but otherwise innocuous business.

This is not inconsistent with the recent decision of this court in *Conti v. United States*, 48 Fed.Cl. 532 (2001). The plaintiff in *Conti* alleged that an NMFS regulation prohibiting the use of drift gillnets in the Atlantic swordfish fishery had taken his property interest in the use of those gillnets without compensation. In the opinion in *Conti*, Judge Margolis concluded that a participant in the Atlantic swordfish fishery did not possess a property interest in the continued use of gillnets in that fishery; therefore, no taking had occurred. *Conti* is distinguishable. There was no revocation of any of Conti's existing permits by any government body, nor was there any denial of future permits. The decision to implement the gillnet moratorium was made by the NMFS, not Congress. The restriction was limited to a particular use of plaintiff's boat, not, as here, effectively all uses. Importantly, there was no allegation that the plaintiff was being singled out. The court's analysis, moreover, focused on the permit itself as the relevant property interest. The court stated, "[P]laintiff's reliance on his permit cannot confer a property interest upon him," and agreed with the government's assertion that "fishery permits do not create property interests." *Conti*, 48 Fed.Cl. at 538; *see also* 16

Nuclear * * * held independent of their denied permits." *Mitchell Arms*, 26 Cl.Ct. at 6.

U.S.C. § 1853(d)(3)(D). The question the court addresses here is framed differently: whether the legislation took all economically beneficial use of the ship.[14]

Defendant also points the court to *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). In *Bowen*, the Court considered whether the State of California, based on an agreement with the federal government pursuant to a federal statute, possessed a protected property right to withdraw from the Social Security scheme. The Court rejected California's argument and held that the " 'contractual right' at issue in this case bears little, if any resemblance to rights held to constitute 'property' within the meaning of the Fifth Amendment." *Bowen*, 477 U.S. at 55. This finding was based on the fact that "the termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in [the statute] itself." *Id.* The subsequent legislation, in short, took away what prior legislation had created. The facts here are plainly different, for reasons already cited. Fishing as a livelihood is not a creation of the government. We conclude that plaintiff possessed a property interest in using its vessel to fish, albeit subject to the regulatory regime. We must now decide whether the particular facts of this case constitute a taking in the context of the three-part *Penn Central* test.

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[14] We note also that the court in *Conti* did not address the revocation of existing permits.

1. Interference with Distinct, Investment-Backed Expectations

In the years leading up to the time plaintiff purchased the *Atlantic Star* and began investing money in its conversion to a pelagic trawler, the NMFS and the ITC expressly stated that there was a need for larger fishing vessels in the Atlantic mackerel fishery. In 1994, the NMFS had rescinded a control date for Atlantic mackerel because the MAFMC no longer believed "that the Atlantic mackerel fishery [would] require the imposition of some type of limited-entry management system." 59 Fed. Reg. 49,235 (Sept. 27, 1994). Furthermore, the ABC for Atlantic mackerel in 1997, 1998, and 1999 far exceeded the U.S. commercial landings of Atlantic mackerel in those years. For example, in 1997, the ABC for Atlantic mackerel was 1,178,000 metric tons, but the U.S. commercial landings amounted to only 15,706 metric tons. Plaintiff planned to catch 50,000 metric tons of Atlantic mackerel *and* herring per year. Thus, plaintiff reasonably believed there was ample room in the Atlantic mackerel fishery for the *Atlantic Star*.

Pursuant to the regulatory scheme, a permit had already been issued to the *Atlantic Star* at the time the 1997 Appropriations Act was enacted. The plaintiff was therefore legally entitled to use the *Atlantic Star* to fish for Atlantic mackerel in the EEZ. Under the regulations, this entitlement could only be revoked for cause. The regulations created certain expectations in both applicants and permit holders. The NMFS, for instance, did not have discretion regarding the issuance and renewal of Atlantic mackerel permits. The NMFS must "issue a permit within 30 days of receipt of the application, unless the application is deemed incomplete" for one of five reasons:

> (i) The applicant has failed to submit a complete application * * *;

(ii) The application was not received by the Regional Administrator by the applicable deadline set forth in this section;

(iii) The applicant and applicant's vessel failed to meet all applicable eligibility requirements set forth in this section;

(iv) The applicant applying for a limited access multispecies combination vessel or individual DAS permit, a full-time or part-time limited access scallop permit, or electing to use a VTS, has failed to meet all of the VTS requirements * * *; or

(v) The applicant has failed to meet any other application requirements stated in this part.

50 C.F.R. § 648.4(e)(1). Moreover, as long as a fishing vessel to which a mackerel permit has been issued is in compliance with the laws and regulations administered by the NMFS, the NMFS is required to issue a renewal permit to that vessel within 30 days of receipt of the owner's renewal application. It is also uncontroverted that, but for the revocation of its permit by Congress, the *Atlantic Star* would have fished for Atlantic mackerel in 1997, 1998, and 1999. No regulations were promulgated in 1997 or 1998 that would have prevented the *Atlantic Star* from obtaining a permit to fish for Atlantic mackerel. Furthermore, plaintiff was aware that, in the past, buyback programs such as that created by Sustainable Fisheries Act, Pub. L. 104-297, had been established when the government desired to reduce fishing capacity.

Plaintiff's expectation of being able to use its vessel to fish for Atlantic mackerel was thus reasonable. Indeed, the government, through the NMFS and the ITC, induced plaintiff to make its investment in the *Atlantic Star*. The government cannot now argue that reliance by plaintiff on the government's own statements was unreasonable.

Plaintiff could not assume that the regulatory regime would remain static, but it had no reason to anticipate that Congress would render the regulatory regime *uniquely* unavailable to it. Plaintiff could not have anticipated that Congress would single it out to revoke its permits by legislation.

In a regulated industry, government, through the implementation of a regulatory scheme, helps set the parameters for the reasonable expectations of investors. *See Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (considering the "regulatory climate that existed when Appellant acquired the subject property" in discussing reasonable expectations); *Branch v. United States*, 69 F.3d 1571, 1582 (Fed. Cir. 1995) (considering the "historical practices in the bank regulatory field" in discussing reasonable expectations); *Atlas Corp. v. United States*, 895 F.2d 745, 758 (Fed. Cir. 1990) (citing *Connolly*, 475 U.S. at 227 (quoting *FHA v. Darlington, Inc.*, 358 U.S. 84, 91, (1958)) (emphasis added) (" ' "Those who do business in the regulated field cannot object if the legislative scheme is *buttressed* by subsequent amendments to achieve the legislative end." ' "); *Am. Cont'l Corp. v. United States*, 22 Cl.Ct. 692, 697 (1991) (emphasis added) ("[E]xpectations must be based not only on then-existing federal regulations but also on the recognition that there may well be *related* changes in the regulations in the future."). And Congress, of course, retains the authority to change or even abolish that scheme. The mere fact of regulation, however, does not signify that an investor can never form a reasonable expectation of a return on his investment.

Moreover, having established a particular regulatory scheme, there are limits imposed by the Fifth Amendment to the actions Congress can take in regard to that regulatory scheme without compensating investors who have reasonably relied on the scheme. Plaintiff, when considering entry to the fisheries, could have reasonably anticipated a certain range of

future governmental regulation, duly promulgated through the regulatory scheme Congress established. Plaintiff perhaps also could have reasonably foreseen legislation that would limit, in a way applicable to others similarly situated, the issuance of future permits. The targeted revocation of existing permits, however, and the targeted denial of future permits by Congress were not events any citizen in a constitutional republic could have reasonably expected.[15] In short, at the time plaintiff made its investment in the *Atlantic Star*, its expectation of participating in the Atlantic mackerel fishery was reasonable.

2. Degree of Economic Impact[16]

The economic impact on plaintiff of the appropriations riders was severe. Plaintiff spent nearly $40 million on the *Atlantic Star* specifically to equip it to participate in the Atlantic mackerel and herring fisheries. With the enactment of the riders, this investment was wiped out. The *Atlantic Star* could not profitably operate without the permits that were revoked and denied by Congress; the appropriations riders prohibited all profitable uses of the vessel.

The fact that all profitable uses of the *Atlantic Star* were prohibited distinguishes this case from *Andrus v. Allard*, 444

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[15] The retroactivity and targeted nature of the legislation shall be addressed in the discussion of the character of the governmental action.

[16] As previously noted, defendant did not respond to plaintiff's proposed findings of fact regarding the economic impact of the legislation. For the reasons already discussed, we therefore deem established the facts alleged by plaintiff and supported by the evidence contained in the appendices accompanying plaintiff's motion.

U.S. 51. In that case, the U.S. Supreme Court determined that a prohibition on the sale of Indian artifacts containing eagle feathers did not effect a taking. As previously noted, this finding rested in part on the fact that "it [was] not clear that appellees [would] be unable to derive economic benefit from the artifacts." *Andrus*, 444 U.S. at 66. Here, the facts demonstrate the opposite conclusion: plaintiff was unable to derive any profitable economic benefit from the *Atlantic Star* after enactment of the appropriations riders. Although the vessel may have retained some scrap value, the government has not argued the possibility. In any event, the diminution in the vessel's value would have been virtually total. After the enactment of the appropriations riders, the *Atlantic Star* had no *commercially viable* uses.[17]

3. Character of the Governmental Action

The factor of "the character of the governmental action" has been cast in terms of whether the government physically appropriates the *res* or comes close to doing so. *See Penn Cent.*, 438 U.S. at 124.[18] The plurality opinion in *Eastern*

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[17] This severe economic impact also distinguishes the instant case from *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). In *Goldblatt*, the Court upheld an ordinance regulating dredging and pit excavating as a valid exercise of the police power not requiring the payment of compensation. This holding rested on the fact that there had been no evidence presented "which even remotely suggest[ed] that prohibition of further mining [would] reduce the value of the lot in question." *Goldblatt*, 369 U.S. at 594. Here, the evidence to the contrary is uncontested.

[18] In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the court found that *Lucas* had changed this criterion, "from one in which courts * * * were called upon to make ad hoc balancing decisions, balancing private property rights against state regulatory (cont'd)

Enterprises, however, suggests that, in considering the character of a governmental action alleged to constitute a taking, at least two other factors are also relevant: (1) whether the action is retroactive in effect, and if so, the degree of retroactivity; and (2) whether the action is targeted at a particular individual. *Eastern Enterprises*, 524 U.S. at 532-37.[19] Both factors are present here.

The appropriations riders not only denied future permits but also voided the ones that had already been issued to the *Atlantic Star*. This revocation retroactively made the regulatory scheme established by the Magnuson Act unavailable to plaintiff. Plaintiff had complied with the scheme, but that compliance was retroactively rendered ineffective by Congress.

The disproportionate impact of the legislation is as severe as that at issue in *Eastern Enterprises*. In *Eastern Enterprises*, the plurality stressed the plaintiff's lack of responsibility for the "problem in the funding of retired coal miners' health benefits." *Eastern Enterprises*, 524 U.S. at 537. Here, there is no serious evidence that a problem in the Atlantic mackerel fishery even existed, and there is no evidence that plaintiff was uniquely responsible for any

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policy, to one in which state property law, incorporating common law nuisance doctrine, controls." *Loveladies Harbor*, 28 F.3d at 1179.

[19] The plurality's discussion of retroactivity seems to bridge its analysis of reasonable, investment-backed expectations and its analysis of the character of the governmental action. Because the question of whether plaintiff could have reasonably expected retroactive legislation and the question of whether retroactive legislation is of such a character as to support the finding of a taking appear to us to be two sides of the same coin, we discuss both retroactivity and targeting in our analysis of the character of the governmental action.

alleged problem. Without this evidence of responsibility, retroactively making the regulatory scheme unavailable to plaintiff has no support. This retroactivity favors finding a taking.

The circumstances here are different from those in *United States v. Locke*, 471 U.S. 84 (1985), where legislation was adopted revoking mining rights that were not perfected within a certain period of time: "As long as proper notice of these rules exists, and the burdens they impose are not so wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced 'alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole,' the burden imposed is a reasonable restriction on the property right." 471 U.S. at 107 n.15 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Here, there was no proper notice of the rules, the burdens imposed were disproportionately distributed, and one entity was singled out to bear "public burdens which, in all fairness and justice, must be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

All of the legislation in question here was clearly targeted at the *Atlantic Star*, as the predecessor bills to the appropriations riders indicate. As previously stated, Senator Snowe, when introducing S. 1192, referred to a "369 foot factory trawler" that was about to enter the Atlantic mackerel and herring fisheries; she was surely referring to the *Atlantic Star*. Furthermore, Congress was informed, during hearings regarding H.R. 1855, that the size prohibitions under consideration would affect only the *Atlantic Star* and no other vessels. Congressman Jack Metcalf of Washington also pointed out this fact:

> [APFC's] vessel, the *Atlantic Star*, is the only vessel that will be legislated out of existence—and into

> bankruptcy—by enactment of H.R. 1855. Such a result is not only bad fishery policy, it is bad Government policy and is manifestly unfair. We here in Congress should be trying to prevent Government takings of private property, not facilitating them, as this legislation most certainly does.

143 Cong. Rec. E1556-01 (1997).

The effect of the 1997 Appropriations Act was that only the *Atlantic Star*'s permits were revoked; the 1998 Appropriations Act and the 1999 Appropriations Act merely continued this legislative ban on the use of the *Atlantic Star*. The acts could not have achieved their objective any more fully if the *Atlantic Star* had been identified by name in the text of the acts. The character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking. Because the other two parts of the *Penn Central* test are also satisfied, we find that defendant took plaintiff's property interest in the use of its vessel to fish for Atlantic mackerel in the EEZ of the United States from the time the 1997 Appropriations Act was enacted until the time plaintiff sold its vessel.

CONCLUSION

Paragraph 7 of the Supplemental Declaration of Lisa A. Kohlwes Torgersen is hereby stricken. Plaintiff's motion for summary judgment on liability is granted. Defendant's motion for summary judgment is denied. On or before May 9, 2001, the parties shall file a joint proposed schedule for resolving remaining issues.

APPENDIX C

In the United States Court of Federal Claims

AMERICAN PELAGIC FISHING COMPANY, L.P.

Plaintiff,

v.

The UNITED STATES, Defendant.

No. 99-119C.

March 18, 2003.

OPINION

BRUGGINK, Judge.

American Pelagic Fishing Company ("APFC") brings this action pursuant to the Takings Clause of the Fifth Amendment. Liability was previously determined in favor of plaintiff in *American Pelagic Fishing Co., LP v. United States*, 49 Fed.Cl. 36 (2001) ("*American Pelagic I*"). Familiarity with the facts set out in that opinion is assumed. Trial on damages was held in Washington, D.C. on December 2-11, 2002. For the reasons set out below, we accept, with some adjustments, plaintiff's proof of required compensation.

PROCEDURAL HISTORY

Plaintiff, APFC, is a limited partnership, wholly owned by Lisa Torgersen. At one time, the primary asset of APFC was a fishing vessel, the *Atlantic Star*. Currently, its primary asset is the rights to this litigation. Plaintiff filed this action on March 9, 1999, alleging that Congress had effected a complete, temporary regulatory taking of the use of the *Atlantic Star* when it adopted legislation on three occasions, effectively idling the vessel for the period from November

1997 to July 6, 1999. Plaintiff's motion for summary judgment on liability was granted on April 4, 2001, in *American Pelagic I*, 49 Fed.Cl. 36. We applied a *Penn Central* test and held that the legislation took all valuable use of plaintiff's boat within the meaning of the Takings Clause. We determined that Congress' targeted and retroactive revocation of plaintiff's permits effected a loss, not simply of the permits, but of all use of plaintiff's vessel.

On January 28, 2002 defendant sought leave to file an amended answer and assert an affirmative defense and counterclaim based on fraud in connection with the flagging of the vessel. The court denied that motion in *American Pelagic Fishing Co., LP v. United States*, 52 Fed.Cl. 341 (2002) ("*American Pelagic II*"). We held that the government had no evidence that the *Atlantic Star* had been improperly flagged. Nor did defendant bring forward any evidence that Mrs. Torgersen had "knowingly or recklessly [made] false statements with intent to deceive." *Id.* at 343 (citing *Daff v. United States*, 31 Fed.Cl. 682, 688 (1994)). Further, defendant did not give an excuse for its delay in bringing this affirmative defense two months before trial. What remains is for the court to determine the nature and amount of plaintiff's damage, if any.

BACKGROUND

Before going into the particulars of the evidence, the court observes that it has rarely seen a greater contrast in the quality and competence of opposing sets of witnesses. Unlike defendant's witnesses, plaintiff's witnesses were uniformly straightforward, highly qualified, and, with the exception of the Torgersens, disinterested.

1. Beginning the Atlantic Star *Project*

Lisa Torgersen is the President and sole shareholder of APFC. She put herself through undergraduate and graduate school working in the Alaskan salmon industry. Mrs.

Torgersen worked as a crew member on salmon fishing boats during the summers from 1981 to 1989. Her specializations in school were international business and the Japanese language. After she received her masters degree in 1989, Mrs. Torgersen began to work full time for Birting Fisheries, Inc. ("BFI") in Seattle. For two years she continued as a crew member aboard salmon fishing vessels owned by BFI. In 1991, Mrs. Torgersen became the manager for a large factory trawler in Alaska, the *Ocean Rover*.[1] Mrs. Torgersen continued to work for BFI as its Operations Manager and later became the Operations/Sales Manager. BFI owned one large factory trawler and managed two others.

Later, Mrs. Torgersen went to New Zealand to manage two fishing vessels. During this time, Mrs. Torgersen married Harold Torgersen. Harold Torgersen is a Norwegian citizen whose family fished for herring, mackerel, capelin, and blue whiting. His father pioneered the herring and mackerel industry in Norway. Mr. Torgersen worked with his father's business every summer while growing up. In 1973, Mr. Torgersen began working on his father's fishing vessels full time. The vessels were purse seine combined trawlers.[2] In 1986, his family sold its vessels. In 1988, Mr.

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[1] A trawler is a vessel, like the *Atlantic Star*, which tows a net for harvesting fish. A factory trawler has the ability to clean, fillet, freeze and pack fish.

[2] A purse seine vessel uses a fishing seine net to surround the fish. The net hangs vertically, drawn down by weights on one side and held up by floats on the other. It is then pulled together around the fish. A trawl net, in contrast, is towed behind the boat for several hours in order to catch fish. A combination vessel has the capability to use each type of net.

Torgersen formed American Seafood, with two partners, for the purpose of exploiting the Alaskan fisheries. American Seafood purchased vessels in the United States and converted them into factory trawlers.

Although Mr. Torgersen had never been in Alaska, he was in charge of the technical aspects and design of vessels for American Seafood. Once converted into factory trawlers, American Seafood vessels became the highest producing vessels in Alaskan waters. In 1993, Mr. Torgersen sold his interest in American Seafood. He joined a research venture in Chile, fishing for blue whiting. After selling his stake in that venture, Mr. Torgersen managed eleven Russian vessels in Russian waters. He managed vessels of similar size and capacity to the *Atlantic Star*, staying out at sea for as long as six months. In short, Mr. Torgersen is one of the most successful commercial fishermen in the world. Mr. Torgersen eventually ended these activities to help his wife pursue the possibility of a vessel for the East Coast. In early 1996 BFI was sold. Mrs. Torgersen began to hear about the opportunities available on the East Coast of the United States. Mrs. Torgersen left BFI and began to investigate the possibility of a vessel of her own.

a. Herring and Mackerel in the Western Atlantic

The National Marine Fisheries Service ("NMFS") was in the midst of a campaign to encourage American fishing vessels to exploit the high levels of herring and mackerel stocks in the western Atlantic, as Mrs. Torgersen was researching the possibility of her own vessel. The agency considered these fish stocks to be seriously underutilized. NMFS's statements about underutilization of the pelagic

species[3] were discussed in our earlier opinion, *American Pelagic I*, 49 Fed.Cl. at 38. Additionally, the Mid-Atlantic Fishery Management Council published documents which outlined the need for vessels of greater size in order to participate in the world market for herring and mackerel. Plaintiff's witnesses confirmed that in 1997, the East Coast of America was the best, least exploited, fishing opportunity in the world.

NMFS sets quotas for the United States fisheries. The quotas have a direct relationship to the amount of fish available in United States waters. There was virtually no competition in the herring and mackerel industry off the East Coast. At the time Mrs. Torgersen was doing her research, only 15 to 20 percent of what was then the quotas for Atlantic herring and mackerel were being caught. The Rhode Island Seafood Council reported to NOAA in 1998 that there was no danger of overfishing mackerel in this area. In fact, the report noted that it was probable that the mortality rate of the Atlantic mackerel was greater than the catch each year.

In her research, Mrs. Torgersen became aware of these opportunities. She then began to research specifically the viability of entering the western Atlantic waters with a large fishing vessel outfitted for harvesting mackerel and herring. She relied on the International Trade Commission's ("ITC") study, "Mackerel: Competitiveness of the U.S. Industry in Domestic and Foreign Markets." The study confirmed that mackerel fisheries were underutilized in the United States. It

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[3] Pelagic fish are those fish whose habitat is above the floor of the ocean. Here, plaintiff was going to fish for two pelagic species, Atlantic herring, and Atlantic mackerel.

reasoned that due to a lack of economies of scale, the smaller American vessels fishing in the western Atlantic could not compete with the European vessels in terms of quality, transportation and marketing. The study concluded that larger fishing vessels would offer economies of scale and allow the United States Atlantic mackerel industry to compete internationally.

Capt. Michael Genovese testified for defendant. He captains a fishing vessel, the *White Dove Too*, in the western Atlantic. He took the view that the ITC studies were overly optimistic, based on his own difficulty locating mackerel. Capt. Genovese reasoned that mackerel were not present, because he often could not find fish. Additionally, he intimated that the government statistics were based on data which was inaccurately gathered. Neither he nor any other government witness furnished any details or explanation of these purported inaccuracies. The court gives little weight to his suspicions. He displayed a firm conviction that it would be impossible to fish in any manner better than the traditional one already employed off of the East Coast. Yet, Capt. Genovese showed a complete lack of knowledge about vessels of the same size and capacity as the *Atlantic Star*. He made no attempt to conceal his personal opposition to new vessels coming into East Coast waters. We accept the accuracy of the NMFS and ITC data.

Harold Torgersen acknowledged that some of those fishing on the East Coast may not have been able to find herring and mackerel readily. He attributed these difficulties to problems other than the lack of fish, however. He explained that herring are usually widely distributed and can be difficult to find. Advanced methods of targeting and capturing the fish would eliminate most difficulties. Mr. Torgersen also explained that mackerel swim much faster than the cod or haddock normally caught along the East Coast. The *Atlantic Star* was to be outfitted with the best

sonar and finding equipment available.[4] Such a vessel, with substantially more horsepower than those vessels already operating off the East Coast, would be necessary to catch enough Atlantic herring and mackerel to compete with the European industry.

Mr. Torgersen also explained that in order to be profitable in the herring and mackerel industry, a vessel would need to be capable of staying out at sea for long periods of time. This would enable the vessel to stay with the fish as they moved, eliminating the need to continually relocate the schools of fish. He noted, however, that it was common practice for the smaller East Coast vessels to return to shore as soon as their relatively small storage tanks became full. This disruption made the fish more difficult to relocate. The court finds the explanations given by plaintiff's witnesses to be more plausible than Capt. Genovese's unsupported assertions. We conclude that there were ample stocks of mackerel and herring in the western Atlantic. As explained more fully below, the *Atlantic Star* was uniquely well suited to find and catch them.

b. Financing and Marketing

After examining the ITC studies, Mrs. Torgersen investigated whether there would be a market into which she could sell East Coast mackerel and herring. While employed at BFI, she had established a thriving niche market for atka mackerel in Japan. Capitalizing on her strong ties to the Japanese buyers, Mrs. Torgersen sent samples of mackerel to

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[4] The *Atlantic Star* was equipped with sonar that could find herring within 4,000 meters and mackerel within 2,000 meters.

three Japanese companies with whom she had done business previously. Each sent back an enthusiastic letter expressing their desire to purchase large quantities of Atlantic herring and mackerel. Mrs. Torgersen was also confident, based on her previous experience selling pollack with roe that she could cultivate a market for herring with roe among Japanese buyers. The court is persuaded that Mrs. Torgersen could have developed a market for herring, herring with roe and mackerel from the western Atlantic in Japan, as well as other markets.

Mrs. Torgersen then sought financing for a vessel to fish in the western Atlantic. Bryggens, an investment brokerage company, aided Mrs. Torgersen in her search. Initially, a plan was drawn up for the *Atlantic Star* to be a mother ship.[5] However, plaintiff was unable to obtain financing for the vessel on that basis. Investors did not think that the project would offer sufficient economies of scale to make the venture profitable. APFC changed its plans and began to seek financing for a vessel which would both catch and freeze its own fish in the western Atlantic.[6] APFC attempted to find financing for the vessel as a freezer trawler without updating the "mother ship" business plan provided by Bryggens.

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[5] A mother ship is a processing ship which does not catch its own fish. Instead, smaller vessels actually catch fish, which are then pumped onto the processing vessel. Once the mother ship processes the fish they are shipped to the final destination.

[6] This type of vessel is known as a freezer trawler. A freezer trawler has the capacity to catch all its own fish. The fish are then frozen, or processed, on board the vessel. After the fish are processed, they are offloaded to be shipped to their final destination.

Mrs. Torgersen was president and sole shareholder of Atlantic Star Fishing Company ("ASFC"). ASFC was formed in November of 1996 for ease of financing the purchase of a vessel designed solely for the Atlantic fishery. Mrs. Torgersen was also the president, secretary and majority shareholder of Pelagic Management Inc. ("PMI"), which was formed to manage the vessel ASFC purchased. Initially, ASFC and PMI joined as partners in APFC, with PMI as the general partner and ASFC as a limited partner. ASFC and PMI were then joined in APFC by Dutch partners, American Pelagic Combination, V.O.F., as APFC sought additional financing for its venture. American Pelagic Combination, V.O.F., owned by Parlevliet and Van der Plas, gained a 49% interest in APFC.[7] APFC eventually obtained financing from ING Bank in The Netherlands to purchase an existing vessel and convert it into a high volume mackerel and herring trawler.[8] APFC was the corporate entity which purchased the *Atlantic Star*.

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[7] American Pelagic Combination, V.O.F. would later withdraw from APFC when the Atlantic Star was sold to Parlevliet and Van der Plas.

[8] As a condition to gain financing, plaintiff obtained a $23 million political risk insurance policy from Lloyd's of London. The premium for the insurance policy was $290,000. Mrs. Torgersen testified that plaintiff did not receive any proceeds from this policy. The policy provided coverage, in part, "in the event that 'any of the permissions are revoked, cancelled or not renewed * * *' Directly as a result of: (i) a Change in Law (as defined herein) and/or (ii) any change to the Open Access Policy relating to the Herring and/or Mackerel Fisheries in the North East Region * * *." Instead, lenders with mortgages on the Atlantic Star received a payment from Lloyd's of London in a settlement.

2. Facilities of the Atlantic Star

Upon securing financing for the venture, plaintiff sought a United States hull for purchase. Procuring an existing United States hull was necessary in order to receive the appropriate U.S. flag, as well as any U.S. fishing licenses. Plaintiff purchased a vessel, which was then named *Apollo II*, for $1.7 million. At the time of purchase, the *Apollo II* was outfitted as an incinerator ship. APFC determined that the vessel was large enough to convert to a freezer trawler. Plaintiff concluded that the cheapest and fastest way to outfit the vessel for pelagic fishing in the western Atlantic was to have it towed to Norway and overhauled.

a. Outfitting the *Atlantic Star*

Mrs. Torgersen ensured that there was enough capacity to achieve profitable economies of scale when choosing fishing and freezing equipment. Additionally, APFC took great care to outfit the *Atlantic Star* with the best, most appropriate equipment for the East Coast herring and mackerel fisheries. The vessel was designed and outfitted as a high volume herring and mackerel trawler.

Capt. Robert Hempstead testified for plaintiff. Capt. Hempstead was the former captain of the *Atlantic Star* during the time that it fished in Mauritanian waters. Capt. Hempstead has been employed in the maritime industry since 1973, serving as captain, first mate and first officer on a variety of vessels. Capt. Hempstead showed comprehensive knowledge of vessels of the same size and capacity as the *Atlantic Star*, as well as the fishing industry in general. In particular he had a detailed understanding of the outfitting of the *Atlantic Star*. The court found Capt. Hempstead to be a highly reliable witness. He explained that the vessel was "purpose-built" for the East Coast fishery.

The *Atlantic Star* was outfitted with a single, large net, approximately 369 feet in length. It was attached to the boat

by lines about 1000 meters long. The net was held open by two large steel doors attached to the back of the *Atlantic Star*, known as trawl doors. It could safely hold 400 to 500 metric tons of fish in what is known as the "codend." Capt. Hempstead testified that the boat could, in one five hour tow, catch at least 300 tons of fish. If it had been allowed to fish in United States waters, APFC would have outfitted the *Atlantic Star*'s net with a sorting grid. The grid would have allowed smaller fish to escape, enabling the *Atlantic Star* to consistently catch a larger size of herring and mackerel.

The *Atlantic Star* had two engines with a total of more than 13,000 horsepower, far in excess of other pelagic trawlers on the East Coast. Almost 7,000 of this horsepower ran the generators for the freezing plant. The remaining horsepower was used to propel the ship. Plaintiff's witnesses testified that horsepower is extremely important when considering how much fish a particular vessel could catch, in part because the net of a vessel is designed around its horsepower. Capt. Hempstead explained that a vessel with more horsepower could tow a bigger net with bigger trawl doors at a higher rate of speed. High speed is important when catching mackerel, because the vessel must be able to keep up with the fish. A larger net and greater speed would, therefore, lead to more fish caught.

Mr. Arne Uhlen, plaintiff's expert on processing plants, testified that the *Atlantic Star* was outfitted with the best freezing equipment available, possibly better than any other ship at that time. He oversaw the operation of the *Atlantic Star*'s processing plant during the time it fished in Mauritania. Mr. Uhlen has worked in the fish processing industry since the late 1970s, and displayed extensive knowledge about the industry. The court finds his testimony highly credible. He took pains to make his testimony accurate. Mr. Uhlen knowledge on the subject of processing

was obviously based on extensive technical understanding, as well as personal experience.

Mr. Uhlen described the processing plan of the *Atlantic Star* as follows. Once caught, the fish were pumped on board, as opposed to hoisted onto the deck still in the net.[9] The *Atlantic Star* could pump 300 tons of fish into the hull in a matter of minutes. As the fish were pumped aboard they were sent through a dewatering tank. The fish were then pumped into the refrigerated seawater tanks ("RSW tanks"). The vessel was outfitted with six RSW tanks. Each tank could hold up to 150 metric tons of fish. As with the fishing equipment, plaintiff incurred extra expense to purchase the maximum freezing capacity for the *Atlantic Star*. Once in the RSW tanks, chilled sea water was used to cool the fish. After they were cooled, the fish were pumped through a sorting machine.

The sorting machine, consisting of a system of rollers, would separate the fish into different sizes and send them into bins filled with chilled water.[10] After the fish were sorted according to size, they were pumped through a tube and into plate freezers. Once inside the freezers, the fish were frozen into solid blocks. The frozen blocks then

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[9] Pumping on board was safer, as the stability of the vessel was not jeopardized by a large net of fish coming on board. Additionally, the fish would remain alive longer while in the codend, instead of being crushed by other fish if brought on deck in the net.

[10] Although the vessel ultimately never fished for herring, the court found the testimony of Ms. Torgersen, Mr. Torgersen and Mr. Uhlen highly credible that the sorting machines were sophisticated enough to sort herring with roe from herring without roe.

traveled along a conveyor belt to machines which placed the blocks in cartons and strapped the cartons shut. Workers would then stack the cartons on wooden pallets.

The plan put forward by plaintiff is not a mere speculation. As explained *infra*, although the vessel was barred from United States waters, efforts were made to fish elsewhere. The *Atlantic Star* fished in Mauritania, the only fishery available without causing the loss of its status as an American-flagged vessel. Mrs. Torgersen put the mechanics of this plan for the ship fully into operation when it was in Mauritania.[11]

b. Plans to Offload at Sea

APFC intended to offload 90% of its frozen fish at sea. This approach was more profitable than going to shore to offload because the vessel would be able to stay at sea, eliminating transit and searching time. The ship was outfitted with everything necessary to remain at sea for months at a time. The *Atlantic Star* had two custom-made cranes. They were designed to lift eight tons and intended to aid the vessel in offloading in whatever weather conditions the vessel might face. The ship carried sufficient fuel, food and parts for an extended trip, and could have been re-equipped by other ships. Further, Capt. Hempstead testified that weather would not play a significant role in the ability of the *Atlantic Star* to fish or remain at sea.[12] The Atlantic Star

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[11] Plaintiff provided the court with a DVD containing a tour of the vessel as it operated in Mauritania.

[12] In fact, Hempstead testified that in the Baltic Sea, a trip discussed *infra*, where the weather conditions are notoriously bad, the *Atlantic Star* was only kept from fishing approximately half a dozen days.

demonstrated its capacity to off-load at sea during its tour in Mauritanian waters.

We give little credence to the contrary testimony of Michael Love. Mr. Love was a former employee of APFC. He was hired to aid in the effort to lobby Congress to allow the *Atlantic Star* to retain its fishing permits. He later served on the crew of the *Atlantic Star* in Mauritania. Mr. Love returned home to the East Coast after the first fishing trip and was not recalled to the *Atlantic Star*. Mr. Love's courtroom demeanor made his unfavorable views of plaintiff clear.[13] Furthermore, it was apparent to the court that Mr. Love had no knowledge of plaintiff's initial business plans, prior to meetings with Congress. Mr. Love testified that he was not present for the initial discussions regarding financing or choice of equipment. Thus, any knowledge about whether plaintiff intended to off load at sea came only after plaintiff was making concessions in an effort to appease members of Congress. The court finds his testimony unreliable. We therefore find that plaintiff intended to offload 90% of its cargo to tramper vessels at sea.[14]

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[13] Defendant attempted to show that Mr. Love was a part owner in the *Atlantic Star*, in order to show that he was qualified to testify regarding the value of the business. However, Mr. Love held, at most, a de minimus interest, for which he never paid. The court, therefore, does not rely on Mr. Love's testimony with respect to APFC's value.

[14] A tramper vessel is a commercial fishing vessel which transports cargo whenever it is hired to do so.

3. Atlantic Star *Precluded from Fishing in United States Waters*

While the *Atlantic Star* was being overhauled in Norway, at a cost of approximately $34 million, plaintiff applied for and obtained all necessary fishing permits.[15] The permits were reissued to the vessel on April 8, 1997 and April 12, 1997. In November 1997, as the *Atlantic Star* was poised to begin fishing, its permits were retroactively voided. At the same time, APFC was prospectively barred from obtaining new permits.[16] The details of the permitting process and

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[15] In order to fish for, possess, or land Atlantic mackerel in the Exclusive Economic Zone of the United States, plaintiff was required to apply for a permit under 50 C.F.R. § 648.4(a)(5). Because incidental by-catch of nonregulated species was possible, plaintiff applied for a Northeast Multispecies (Nonregulated) permit under 50 C.F.R. § 648.4(e)(1). Plaintiff requested an authorization letter from the Regional Administrator in the Gulf of Maine/Georges Bank Regulated Area for plaintiff's net, because the mesh size necessary for herring and mackerel was smaller than normally required by 50 C.F.R. § 648.80(d). The Northeast Regional Office of NMFS issued the following permits on February 5, 1997:

1. Federal Fisheries Permit # 610018, for Atlantic mackerel and *Illex* squid and for incidental *Loligo* squid and butterfish, with an expiration date of December 31, 1997.

2. Federal Fisheries Permit # 610018, for Northeast Multispecies (Nonregulated), with an expiration date of April 30, 1998.

[16] Congress adopted section 616 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub.L. 105-119, 111 Stat 2440 (1997) ("1997 Appropriations Act"), which had the initial effect of revoking plaintiff's permits and barring their reissuance for one year. An identical provision was enacted on October 21, 1998 as section 617 of the Department of Commerce, (cont'd)

subsequent loss of the permits are discussed in greater depth in American Pelagic I, 49 Fed.Cl. at 40.

4. Trips Made by the Atlantic Star

a. Baltic Sea trip

Mrs. Torgersen testified that she tried to put the vessel to some use during what she hoped would be a temporary moratorium after passage of the 1997 Appropriations Act. She took the *Atlantic Star* to the Baltic Sea to participate in a research project. The *Atlantic Star* did none of its own fishing, but operated as a mother ship, processing fish from catching vessels. The vessel only remained in the Baltic Sea for a few months, because the venture was not profitable.

b. Mauritania trip.

Plaintiff was able to utilize the *Atlantic Star* as a fishing and processing vessel for the first time off the coast of Mauritania, in west Africa. Mauritania does not have a fishing fleet of its own and it imposes no restrictions on foreign flagged vessels. Instead, vessels must simply purchase fishing permits. The *Atlantic Star* thus was able to purchase fishing rights while maintaining its status as a United States flagged vessel.

Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1999, Pub.L. 105-277, 112 Stat. 2681 (1998) ("1998 Appropriations Act"). Plaintiff was permanently barred from obtaining herring and mackerel permits by § 3025 of the 1999 Emergency Supplemental Appropriations Act, Pub.L. 106-31, 113 Stat. 57 ("1999 Appropriations Act").

The equipment aboard the *Atlantic Star* performed exactly as expected in Mauritania.[17] The best day of processing for the *Atlantic Star* was 14,872 blocks or approximately 342 metric tons in one day.[18] Within one month, the ship was performing better than any other ship in Mauritania. However, the lack of consistent quantities of fish precluded the vessel from processing at its full capacity. Thus, the *Atlantic Star* was unable to produce to its highest level of 340 metric tons per day, nor at the rate of 250 metric tons plaintiff proposes here, on a regular basis.

Not only was the *Atlantic Star* plagued by a lack of fish, Mauritanian waters posed unique problems for processing. The temperature both of the sea water and the fish in Mauritania was significantly warmer than it would have been in the western Atlantic. It took longer to chill the fish in the RSW tanks, and longer to freeze them in plate freezers. Mr. Uhlen testified that, in contrast, the water temperature on the East Coast of the United States would have been perfect

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[17] Arnie Uhlen did discuss some minor problems with a strapping machine, which was used to close the cartons containing frozen blocks of fish. He acknowledged that for a time only two machines worked. However, the machines were promptly fixed.

[18] The figure 342 metric tons represents 14,872 blocks, multiplied by 23 kilograms. Plaintiff explained that while in Mauritania it packaged up to 23 or 24 kilograms of fish into each carton. These cartons would normally hold 20 kilograms. Plaintiff explained that the fish from Mauritania are often bound to west African markets where weight scales are not available. Therefore, the cartons are packed full so that the buyer knows that it has not been cheated. Plaintiff explained that full packing was possible because there was no reporting regime in Mauritania, which would have required accounting for the extra kilograms of fish.

for the processing system of the *Atlantic Star*, especially in wintertime. Although the conditions were not ideal in Mauritania, Capt. Hempstead testified that the experience in Mauritania showed that the *Atlantic Star* could have operated extremely well in the western Atlantic.

Plaintiff lost money during its time in Mauritania despite the fact that it outfished every other vessel. Mauritanian waters simply did not offer enough fish for a long enough period of time to allow the *Atlantic Star* to be profitable. Other boats were able to supplement their catch by fishing during prime season in Mauritania, but then spending the rest of the year in European waters. The *Atlantic Star* was prohibited from doing the same because it could not fish in European waters. By April 1999, APFC was operating at a loss, and behind on payments. Suppliers were considering arresting the vessel due to the nonpayment of invoices. Attempts to secure additional financing by APFC were unsuccessful. After considering and rejecting Chapter 11 bankruptcy, the partners of APFC, Parlevliet and Van der Plas, agreed to take over both the payment of bills and the revenue of the *Atlantic Star*. Parlevliet and Van der Plas eventually purchased the *Atlantic Star* from APFC on July 6, 1999.[19] From April until July, APFC continued to pay corporate expenses, but Parlevliet and Van der Plas assumed the revenues and expenses for the vessel.

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[19] Plaintiff recorded a gain on the sale of the vessel. Ms. Wendy Visconty, plaintiff's accounting expert, explained that this gain resulted from the difference between removing the vessel from the books and the liabilities associated with the vessel from the books. The gain was not, according to Ms. Visconty, a cash gain to plaintiff.

5. Other Profitable Options not Open to Plaintiff

a. Alternative Fishing Options

Defendant intimates that plaintiff could have fished for herring alone, since permits were not required for herring in the western Atlantic. Mrs. Torgersen testified that mackerel is an inevitable by-catch when fishing for herring.[20] Defendant concedes that a permit is required just to possess mackerel. The 1997 Appropriations Act and 1998 Appropriations Act precluded the *Atlantic Star* from holding the necessary permit. Therefore, we conclude that the *Atlantic Star* could not fish for herring alone, because of the inevitable by-catch of mackerel.

In addition, plaintiff could not take the vessel to any other United States fisheries. The other fisheries within the United States Exclusive Economic Zone ("EEZ") have their own permitting regime, none of which would have been open to the *Atlantic Star*. Under the 1997 Appropriations Act and the 1998 Appropriations Act, no permits of any kind could be issued to plaintiff.[21] The 1999 Appropriations Act only

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[20] Capt. Genovese also testified for defendant that herring and mackerel swim together, and are inevitably by-catch of one another.

[21] The 1997 Appropriations Act § 616(a)(2) stated that none of the funds appropriated in the bill may be made available to issue or renew a fishing permit or authorization "that would allow such a vessel to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States." A vessel could have a permit if it had documentation or endorsements prior to September 1997 and were not surrendered at any time afterwards. However, § 616(c) declared all of APFC's permits to be null and void. Therefore, after the passage of the 1997 Appropriations Act, plaintiff was barred from fishing (cont'd)

restricted the availability of APFC to obtain herring[22] and mackerel permits. Even so, Mrs. Torgersen testified that there was no other fishery large enough in the United States EEZ in which plaintiff could obtain a permit which could have allowed the *Atlantic Star* to make a profit. For instance, the Alaskan fishery was already regulated under a limited access plan. This meant that the fishery was already fully capitalized and open only to those vessels with a prior catch history.[23]

Mrs. Torgersen testified that the only fishery outside of the United States in which the *Atlantic Star* could obtain fishing rights was Mauritania. In order to fish in the EEZ of any other country, re-flagging the vessel would have been necessary. As discussed above, the *Atlantic Star* lost money fishing in Mauritania.

b. Mother Ship Option

Another suggested use of the *Atlantic Star* was as a mother ship. There were several factors which precluded utilizing the vessel in this manner, however. First, APFC could not obtain financing for a venture in which the *Atlantic Star* was simply a mother ship. Because of the *Atlantic Star*'s design and equipment, it probably would have lost

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anywhere a permit was required within the United States EEZ. The language of the 1998 Appropriations Act was identical.

[22] Although not specifically required for the western Atlantic fishery.

[23] A prior catch history, according to Mrs. Torgersen's testimony, is the catch which a particular vessel was able to land in previous years.

money as a mother ship.[24] Second, the vessel could not possess any mackerel without a permit, even as a mother ship.

In sum, Mrs. Torgersen conducted an exhaustive, although ultimately unsuccessful, search for a fishery in which the *Atlantic Star* could be operated profitably and in which it was eligible to obtain all the necessary permits. Defendant offered no evidence to the contrary.

6. Plaintiff's Theory of Recovery

APFC's compensation model is based on the fair rental value of the *Atlantic Star*. Unfortunately, there was no existing market for leasing a vessel like the *Atlantic Star* fishing off the East Coast. The *Atlantic Star* was unique. Contrary to defendant's suggestion, however, this does not preclude a request for compensation. We agree with Dr. James Miller, plaintiff's expert, that an appropriate model for fixing fair rental value can be derived from the reasonably established net revenue stream.

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[24] Capt. Hempstead explained that the *Atlantic Star* had been outfitted to fish and process. This investment was useless when the *Atlantic Star* was used as a mother ship. Plaintiff could not have operated profitably unless it utilized the whole of its capacity. Mr. Uhlen's testimony to the contrary is not persuasive. He acknowledged that he was not sure that such an option was actually profitable. His expertise related to the processing capabilities of the vessel, not its financial management. Mr. Love offered an opinion about the ability of the *Atlantic Star* to operate as a mother ship based on the assumption that the *Apollo II* hull had been outfitted from the outset as a mother ship—a completely separate question.

Dr. Miller is the chairman of an international economic, financial and regulatory consulting firm. He is the former Director of the Office of Management and Budget, former Chairman of the Federal Trade Commission, and has served in several other government capacities. Dr. Miller received a Ph.D. in economics from the University of Virginia. He has taught economics at University of Virginia, George Washington University and George Mason University. His testimony was clear, thorough and showed an understanding of the realities facing the *Atlantic Star*. The court found him to be a highly competent, reliable witness.

Dr. Miller utilized the net revenue stream which would have been available to the *Atlantic Star* in order to determine what the rental value of the vessel would have been in a fair market. He explained that, as with any lease, the total income stream available to the lessee and lessor is a fixed amount. Therefore, whether the lessee were to take on all costs and revenues and pay a fixed amount to lessor, or lessor were to assume some costs for a portion of the revenues, the net effect would be the same. In a competitive market, the difference between the amount that the lessor could have made operating the vessel itself or renting to the lessee will be razor thin. The net revenue stream is an appropriate measure, therefore, for rental value. It represents what the lessee would be willing to pay and what the lessor willing to accept as reasonable rental value. Furthermore, Dr. Miller testified that the conservative nature of the projections he used for plaintiff's revenues, combined with a generous allowance for costs, would leave ample room for a potential lessee to make a significant profit. The business opportunity would have been very attractive to a potential lessee.

After determining the appropriate monthly rental fee, based on the *Atlantic Star*'s revenue stream, Dr. Miller adjusted the monthly fees back to the beginning of the damages period. In order to bring each month's rent back to

the first month of the taking, Dr. Miller applied the weighted average cost of capital ("WACC"). He explained that each corporation's WACC is based on its cost of debt and equity and the corporation's mix of each. The cost of debt is determined by the cost of third-party loans held by that entity. The cost of equity is determined by the return on equity earned by other fishing firms during the same period. Taken in their relative proportion in APFC's financing structure establishes APFC's WACC of 18.5%. When he brought the operating margin back to December 1997, the first month of the taking, the rental value for the *Atlantic Star* was $44,742,926. Dr. Miller based his calculations on a 75,000 metric ton per year model. The net revenue from the sale of herring and mackerel would have been $72,577,500. The total costs, based on a 75,000 metric ton model were estimated at $27,834,574.

Once plaintiff's revenue stream for the rental of the *Atlantic Star* was brought back to the date of the taking, Dr. Miller applied a rate for a safe investment, the five year treasury rate, to bring plaintiff's damages to current dollars. The current value of the rental value of the *Atlantic Star* at the time of trial was $55,913,929. The reasonableness of plaintiff's damages model will be discussed *infra*. However, the court first addresses disputes with respect to the figures for revenues and costs imbedded within the calculation.

a. Price of Herring and Mackerel

Plaintiff's expert, Mr. David Ellenton, provided the court with an analysis for the appropriate sales price for herring and mackerel. He has a wealth of knowledge about the world export market for herring and mackerel based on experience marketing large volumes of fish. Mr. Ellenton was a very convincing witness.

Mr. Ellenton determined that American export prices were not the appropriate measure, because they were too

high. The overall American market for Atlantic herring and mackerel is very small. The majority of Atlantic herring and mackerel caught in America goes into the domestic bait market, a small niche market which artificially inflates the average price of Atlantic herring and mackerel. American producers do not sell in volume into the larger international markets, and their prices thus do not provide a good benchmark for the volume of fish APFC would produce. Therefore, he examined the Dutch and Norwegian export prices for herring and mackerel.[25] Norway and Holland are the world's largest producers. According to Mr. Ellenton, due to the volume of fish the *Atlantic Star* would have marketed, Dutch and Norwegian prices are the appropriate starting point.

Mr. Ellenton established an average Dutch and Norwegian price for each month during the damages period based on information provided by the Norwegian Seafood Export Council and the Netherlands Central Bureau of Statistics. The raw data provided by these agencies listed the price for herring or mackerel sold into a particular country by month. Mr. Ellenton established an average monthly price based on the prices for those markets into which he anticipated APFC would sell. He made no decisions about how much of plaintiff's anticipated 75,000 metric tons of fish would be sold into each particular country. Instead, he included in his average price all of those markets into which

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[25] During trial defendant objected to Mr. Ellenton's testimony as it related to world export prices. During discovery the parties had agreed to rely upon United States export prices for Atlantic herring and mackerel. However, the government's own witness based his opinion on the same world export prices. This made irrelevant the attorneys' prior agreement.

he anticipated APFC would sell. He then adjusted that price based on the average exchange rate from Dutch and Norwegian currency.

Mr. Ellenton explained that the *Atlantic Star* may not have been able to sell fish at the Dutch and Norwegian prices. As a new vessel in the market, the *Atlantic Star* would have a market entrance barrier to overcome. Additionally, the fat content in the fish supplied in the United States might be lower than that supplied by Dutch and Norwegian vessels. This could have affected price, because some purchasers prefer fish with higher fat content. These differences led Mr. Ellenton to make a reduction of 10% to both the Dutch and Norwegian export prices. He then averaged the two, concluding that APFC would have received $ 0.41 per kilogram for Atlantic herring and $ 0.73 per kilogram for Atlantic mackerel. The prices which Mr. Ellenton provided were free on board ("F.O.B.").[26]

The government's expert on this issue, Mr. Jeffery Reichle, did not dispute the basic premise of Mr. Ellenton's analysis-that American export prices were not an accurate model for prices the *Atlantic Star* would have received. Beyond that point, however, he and Mr. Ellenton parted ways. Mr. Reichle did not pretend to be a disinterested witness. He was heavily involved in the lobbying effort to keep the *Atlantic Star* from fishing off the East Coast. Furthermore, Parlevliet and Van der Plas, the partners of ASFC in APFC, had offered to buy Mr. Reichle's business, Lund's Fisheries. In his view, the offered purchase was an

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[26] A F.O.B. price assumes that the fish are sold direct from the vessel. The price does not incorporate a cost for shipping.

effort to remove him as an opponent to the *Atlantic Star*. Furthermore, his testimony reflected inattention to detail and a lack of knowledge about Mr. Ellenton's method. Nor was he experienced in the volumes of fish APFC would have sold. For these reasons, the court gives little weight to his testimony.

Mr. Reichle opined that only Dutch prices for herring and mackerel were appropriate measures. He thus excluded Norwegian export prices. Mr. Reichle reasoned that almost all Norwegian product went to Japan because Norwegian fish were caught by purse seine nets and frozen by blast freezers, making them more desirable. However, Mr. Reichle testified that he did not know whether Mr. Ellenton had made any adjustments based on where APFC would market its fish and he was unaware which markets Mr. Ellenton included in his average Norwegian price. Additionally, Mr. Ellenton's report provides sufficient evidence that the Norwegian product was not, in fact, sold primarily to the Japanese market. The court rejects Mr. Reichle's reliance on Dutch prices alone.

Mr. Reichle made certain price reductions to Mr. Ellenton's model. Mr. Reichle opined that the fat content of Atlantic herring and mackerel in the western Atlantic tends to be lower than that in Dutch waters. Additionally, he testified that those fish caught in the western Atlantic tended to be smaller than those in the Dutch waters. He reasoned that a 10% quality adjustment from the Dutch price for mackerel and 15% for herring was appropriate. Mr. Reichle stated that a differentiation between APFC prices and the Dutch prices was necessary because the Dutch fleet was made up of primarily purse seines. According to him, purse seines would produce a higher quality of fish because they would not damage the fish in the same way that a trawl vessel would. Finally, Mr. Reichle explained that the vertical plate freezers which APFC intended to use would produce a lower quality

of frozen fish than usually provided by Dutch vessels, which used blast freezers.

Mr. Reichle provided no information as to why a greater adjustment was necessary for herring as opposed to mackerel. Further, he did not explain why the quality adjustments Mr. Ellenton made were not sufficient. Mr. Ellenton testified that his 10% price reduction took into account the difference in fat content between the American and European producers. Mr. Torgersen testified that during the damages period the Dutch fleet did not, in fact, contain *any* purse seines. In addition, both Mr. Torgersen and Mr. Ellenton explained that the majority of Atlantic herring and mackerel are frozen in the same manner as the *Atlantic Star*. In fact, Mr. Ellenton testified that there was almost no gap in the quality between American and European product. It would be even less significant for the *Atlantic Star*, which would be able to catch larger fish and process them without damage. The court rejects Mr. Reichle's quality adjustments.

Mr. Reichle also made a reduction in price for the increased distance between the vessel and its final market for APFC, in comparison to Dutch producers. Mr. Reichle reasoned that a $0.035 per kilogram reduction from plaintiff's prices would be appropriate for the difference in freight costs. He opined that because the *Atlantic Star* would be off the East Coast of the United States it would have to pay more for transport to final markets.

There are several problems with Mr. Reichle's adjustment. First, he relied on Mr. Ellenton's prices for his analysis, which were F.O.B. Therefore, as pointed out in the supplemental report of plaintiff's accounting witness, Ms. Visconty, freight is most appropriately an additional cost, not an adjustment to price. Nor did Mr. Reichle provide a basis for the amount of his adjustment. He exhibited a lack of knowledge regarding shipping cost for the volume of fish

which APFC proposed. This lack of knowledge was compounded by the fact that he calculated an adjustment for freight not knowing into which countries Mr. Ellenton's price reflected sales. For these reasons, the court makes no adjustment to plaintiff's price for transportation costs.

Finally, the court rejects Mr. Reichle's adjustment based on his understanding that Dutch producers routinely package 23 kilograms into 20 kilogram cartons. As explained by Mr. Torgersen, the Dutch regulatory system requires that every kilogram of fish which is caught, as well as every kilogram of fish produced, be reported. The Dutch prices reflected in Mr. Ellenton's reports are reported by the kilogram, and not by the carton. Therefore, whether a carton could hold 20 or 23 kilograms would be immaterial for purposes of determining price, since the prices are reported per kilogram. Furthermore, plaintiff's witnesses, whom the court finds to be more reliable, all testified that the there is no over-packing done by Dutch producers. Instead, if a market, as in Mauritania, requires that a carton is packed full, both the buyer and seller understand that the price negotiated is per kilo, no matter how full any particular carton may be. Therefore, the court will not adjust plaintiff's prices for a difference in Dutch packaging methods.

b. Price of Herring with Roe

Mr. Ellenton determined that the most appropriate price for herring with roe was $1.38 per kilogram. Unlike prices for Atlantic herring and mackerel, Mr. Ellenton determined that the United States export price was, in fact, the most accurate measure. He reasoned that the price of herring with roe sold to Japan and China today from the United States is the most analogous to the product that APFC would have sold. Currently, the United States exports herring with roe caught off the West Coast. Mr. Ellenton confirmed Mrs. Torgersen's view that the *Atlantic Star* would have caught

enough herring with roe to create a market at $1.38 per kilogram. He acknowledged that there are routine closures, disallowing fishing during specific time periods along the Gulf of Maine during the herring spawning season. However, Mr. Ellenton explained that there are no closures on George's Bank, in northern Maine. He testified that the *Atlantic Star* could have harvested enough herring with roe there to provide a sufficient supply to maintain the $1.38 per kilogram price.

In contrast, Mr. Reichle concluded in his expert report that APFC had not intended to market herring with roe. In addition, Mr. Reichle testified that he had no experience marketing that product. Nor was he aware of Mrs. Torgersen's ties to the Japanese market. He based this on the deposition of Mrs. Torgersen, in which, when asked if there were any mention of Atlantic herring with roe in the 1998 budget, she responded that there was not. She went on, however, to explain that the 1998 budget was a "preliminary, probably working document and it was just to get an idea of the overall, just the big picture." Furthermore, this preliminary budget was prepared during negotiations with Congress. Mr. Reichle conceded that the budget to which Mrs. Torgersen referred in her deposition had little bearing on her plans to market herring with roe. It was also apparent from Mrs. Torgersen's testimony, as well as her business plans that APFC did, in fact, intend to market herring with roe. The court finds that there is no basis to reject Mr. Ellenton's price for herring with roe.

c. Costs

The second element of plaintiff's damage calculation is the offsetting cost of operation. Ms. Wendy Visconty, a managing director of RSM McGladrey, Inc., testified for the plaintiff. She was qualified as an expert in auditing as well as accounting, particularly for businesses of the size and type

of APFC. She had experience with auditing Alaskan fishing vessels. Ms. Visconty provided the court with an extensive and detailed analysis of the *Atlantic Star*'s costs. Her report was well documented and thoroughly researched. Unlike defendant's accounting expert, Mr. Paul Berdy, Ms. Visconty did not have any personal connection to the case.

She included three categories of costs: materials, labor, and manufacturing overhead. Within materials she included costs necessary to package the *Atlantic Star*'s catch, as well as those expenses related to offloading and storage. The cost of packaging material, including the cartons and their plastic liners, was independently verified by a quote obtained from a supplier at $3,752,000. Ms. Visconty included docking, cold storage, and pallet replacement within her calculations for off-loading at $636,000. These costs were approximated from available prices from actual suppliers.

Labor costs of $12,584,135 included crew salaries and share, payroll taxes, technician fees, crew travel, and galley supplies. For crew salary and share,[27] technician fees, as well as the computation payroll taxes, Ms. Visconty assumed that for highly skilled workers, the *Atlantic Star* would be competing with similarly outfitted vessels in the Alaskan fisheries. She explained that in this industry it is common for highly skilled crew to be flown long distances in order to outfit vessels. Ms. Visconty therefore based her opinion on salaries, technician fees, and crew share information for the *Atlantic Star*'s crew in Mauritania, but also for similar

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[27] Ms. Visconty testified that the cost for crew share would vary according to the amount of the *Atlantic Star*'s production, because crew share is calculated on a percentage of production sold.

vessels in Alaska. This resulted in higher overall costs. She then included a modest increase to these costs in order to make the estimates very conservative, i.e., higher. She based her estimates for crew travel and galley supplies on the *Atlantic Star*'s actual experience in Mauritania, once again including an adjustment to ensure the estimates were conservative.

Finally, Ms. Visconty estimated costs for manufacturing overhead. She included $10,862,439 in costs for spare parts, repairs and maintenance, fuel, insurance, brokerage fees, administration[28] and other miscellaneous expenses. Once again, Ms. Visconty relied on both independent research and the *Atlantic Star*'s experience in Mauritania. As with the earlier expenses, she included an adjustment in order to ensure her numbers were not only accurate, but conservative. Therefore, although the *Atlantic Star* only incurred, on average, $52,000 per month in spare parts costs, Ms. Visconty's report includes costs of $100,000 per month in costs. The increase allowed for the replacement of a net, as well as the wear which could occur because of aggressive fishing on the East Coast. The same type of analysis was done for repairs and maintenance. Fuel costs were estimated based on the fuel usage of similar sized engines. Insurance, brokerage and other miscellaneous fees were calculated by comparison to vessels of similar size.

Mr. Berdy testified for defendant. He did not dispute Ms. Visconty's basic analysis. He contended that there were

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[28] Brokerage fees and administration costs, according to Ms. Visconty would have a direct relationship with production by the *Atlantic Star*.

costs missing from her report. He explained in his report that an *ad valorem* customs fee, political risk insurance, and drydocking costs should all be included within *Atlantic Star*'s expenses. Mr. Berdy also opined that the costs provided by Ms. Visconty should be altered based on what he termed inconsistencies in the record. He asserted that previous testimony by Mr. Love and Mrs. Torgersen conflict with Ms. Visconty's cost assumptions. Furthermore, Mr. Berdy testified that the crew compensation level proposed by Ms. Visconty was too low.

Without calling into question Mr. Berdy's general competence as an accountant, we have serious misgivings about his qualifications to testify in this case. Mr. Berdy had very limited experience in providing accounting services for fishing operations. Nor was he a disinterested witness. His limited experience was largely based on his work for Lund's Fisheries, which is owned by Mr. Reichle. Mr. Berdy traveled to the Netherlands with Mr. Reichle for meetings with Parlevliet and Van der Plas to discuss the purchase Lund's Fisheries. Mr. Berdy worked with an accountant from the Dutch partners and came up with a projected sales price for Lund's Fisheries. Mr. Berdy acknowledged that he did not directly rely on Generally Accepted Accounting Principles in his analysis. He exhibited a general lack of knowledge about the facts of this case.

Mr. Berdy testified that plaintiff should have included in its calculations an *ad valorem* customs duty which may have been assessed on the *Atlantic Star*, as well as the premiums for political risk insurance and additional drydocking costs. With respect to the *ad valorem* duty, Mr. Berdy relied on Mrs. Torgersen's deposition in which she referenced a $2 million estimate for this customs duty. When pressed by plaintiff's counsel Mr. Berdy conceded that he had made no further inquiries into the nature of the assessment, and "without doing proper research, [he] wouldn't know"

whether the *ad valorem* duty should be included as an operating cost.

Ms. Visconty explained that because the *ad valorem* tax is assessed on the vessel itself, as opposed to its operation, the tax is a capital cost. It is generally considered to be part of the cost of constructing a vessel. In addition, the nature of an *ad valorem* tax is that it is subject to negotiation between vessel owners and the government over a period of one to two years. She therefore concluded that the *ad valorem* tax should not be considered an operating cost.

Mr. Berdy also displayed a lack of understanding with respect to how the *Atlantic Star* had been financed. He was unaware of the reasons for obtaining political risk insurance and the terms of that insurance. Mr. Berdy stated that he would have to do further research before he could be sure that the cost of political risk insurance should be included within expenses. Because Mr. Berdy himself is not sure whether these costs should be included, the court will rely on Ms. Visconty's more authoritative analysis leaving them out.

Mr. Berdy's inclusion of drydocking costs was based on Mrs. Torgersen's offer to Congress to spend $1,000,000 on a repair facility in New England. There is no question that this was not a necessary cost. The offer was made in response to political pressure in an unsuccessful effort to preserve her fishing rights. For the same reasons, we decline to make any adjustments to Ms. Visconty's analysis as it relates to offloading costs. Mr. Berdy also based this adjustment on statements made by Mrs. Torgersen to members of Congress with respect to her willingness to build a cold storage facility and offload the majority of its catch on shore. We decline to make Mr. Berdy's proposed adjustments.

Finally, the court will not adopt Mr. Berdy's analysis of crew costs, which was based on Mr. Love's testimony. Without meeting Mr. Love, understanding his relationship to

plaintiff, or independently verifying his testimony, Mr. Berdy opined that the court should rely on Mr. Love's testimony regarding crew compensation. As explained earlier, the court did not find Mr. Love's testimony credible in its own right. It is no more credible when filtered through Mr. Berdy's report. Furthermore, Ms. Visconty provided the court with an extensive analysis of the *Atlantic Star*'s actual compensation of its crew, as well as salaries for similar vessels in Alaskan waters. The court finds this to be more reliable. We therefore make no adjustment to plaintiff's crew compensation costs.

d. Adjustment to Catch Volume

One adjustment to the basic assumptions of plaintiff's model must be made, however. In his calculations, Dr. Miller assumed that the *Atlantic Star* would produce 75,000 metric tons of fish (37,500 metric tons of herring, 37,500 metric tons of mackerel) each year. Plaintiff put forward testimony and exhibits showing the availability of fish well in excess of this 75,000 metric tons per year. Plaintiff met its burden to show that the *Atlantic Star* was physically capable of catching and processing this amount of fish each year. Defendant nevertheless urges the court to adjust plaintiff's model to reflect 50,000 metric tons per year, based on two theories.

First, defendant looks to plaintiff's comments made to Congress. Plaintiff had some notice that Congress, in response to pressure from owners of small local vessels, was considering voiding its permits. The government makes much of plaintiff's efforts to forestall congressional action. Mrs. Torgersen, along with Michael Love, met with members of Congress, including Senator Olympia Snow. At those meetings, plaintiff attempted to come to some agreement with those members whose constituents had expressed concern about the *Atlantic Star*. Mrs. Torgersen put together

several proposals. One of these proposals would place a self-imposed limit of 50,000 metric tons per year on the vessel. The efforts were to no avail. Nevertheless, defendant offers plaintiff's statements as proof that its original plans were actually smaller than 75,000 metric tons, on a scale with the reduced plans for harvesting offered under the duress of the negotiating process with Congress.

We are surprised and disappointed that the government would make use of statements, prompted under what amounts to political duress, to draw into question Mrs. Torgersen's credibility. The discussions between Mrs. Torgersen and members of Congress were about political compromise, not plaintiff's initial expectations. Plaintiff was at risk of losing its entire investment in the *Atlantic Star*, and, not surprisingly, was willing to make large concessions in order to preserve some value in that investment. We therefore assign no meaning to statements made during the negotiations about fishing capacity, on shore facilities or off-loading on shore.

The court is thus persuaded that the *Atlantic Star* was capable of producing in excess of 50,000 metric tons of fish. Indeed we are persuaded it was capable of producing in excess of 75,000 metric tons. The capacity and fish were there. In terms of the rental value of the boat, however, it is also relevant to know what would have been represented to prospective, albeit, tentative, renters. In this respect, plaintiff's business plan is important, and it is the evidence as to that plan which introduces uncertainty about the 75,000 metric ton figure, for an annual catch.

Uncertainty as to this figure was introduced by Mr. and Mrs. Torgersen themselves in their affidavits in support of plaintiff's motion for summary judgment. Mrs. Torgersen provided a declaration in support of Plaintiff's Response to Defendant's Motion for Summary Judgment in July of 1999.

In it, Mrs. Torgersen stated that APFC had planned to harvest Atlantic mackerel from December to May and Atlantic herring year round "for a total approximate amount of 50,000 [metric tons] per year." Mr. Torgersen agreed with those statements. Neither Mr. Torgersen nor Mrs. Torgersen were under compulsion to provide the court with that number. Plaintiff is bound by such statements. There is no reason the court should not rely upon them. We therefore find that plaintiff's original plans called for producing approximately 50,000 metric tons of herring and mackerel per year. This figure represents an unquestionable quantity that it both planned to produce and could in fact produce, and thus an appropriate figure for calculate what a willing renter would have paid.

DISCUSSION

A. Impact of *Tahoe* Regulatory Takings Analysis

After our decision in *American Pelagic I*, the Supreme Court decided *Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002), addressing the elements of a temporary regulatory taking. The Court rejected a *per se* rule modeled solely on *Lucas*, because of its concern that the rule would make routine moratoria actionable. The routine delays inherent in a legitimate regulatory process should not prompt an automatic temporary taking. Instead, if regulatory action has the effect of denying all economically viable use of property, a *Penn Central* analysis is then conducted in order to determine whether, under "all the relevant circumstances" a taking is established. *Tahoe-Sierra*, 535 U.S. at 335 (referring to *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001)).

In the present case, the "relevant circumstances" include the fact that the character of the government action here strongly tends toward a taking. Congress retroactively revoked plaintiff's permits in a targeted fashion. The

Atlantic Star was the only vessel which fell within the ambit of the 1997, 1998, and 1999 Appropriation Acts. It is clear from the record that Congress' decision was not the result of a typical regulatory process. Instead, it was motivated by political considerations directly aimed at the *Atlantic Star*. Congress' action was far from being a routine delay in agency decision-making. There was no permit application pending. All permits had been granted. No decision was held in abeyance pending fact finding. Congress simply decided not to allow the *Atlantic Star* to fish using its previously issued permits. The character of the government action thus points to a taking. None of the Court's concerns in *Tahoe* about promoting deliberative regulatory consideration apply.

We thus confirm our previous holding that the three-part *Penn Central* test for a taking is met. The plaintiff had a reasonable investment backed expectation that it could profitably, legally, use its vessel. As further explained below, the economic impact was a 100 percent loss of economically viable use. And, finally, the character of the government's action points to a deliberate decision to take the use of the vessel for public purposes.

B. "All Economically Viable Use"

In *American Pelagic I*, we found that no other economically viable uses were available to the plaintiff. Nevertheless, because we left open the question of whether plaintiff had established any economic impact of the legislation, we allowed defendant at trial to offer evidence of alternative uses. As we found *supra*, however, there were indeed no other profitable uses available to the *Atlantic Star*. Defendant nevertheless offers three other arguments as to why plaintiff's evidence still does not satisfy its burden of proof.

Where a taking has occurred, compensation is required for a taking in "the extraordinary circumstance when no productive or economically beneficial use of [the property] is permitted." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992); *Tahoe-Sierra*, 535 U.S. 302 (distinguishing the normal regulatory action from the regulatory taking based on the removal of all economically viable use). The plaintiff bears the burden of showing that no economically viable use remains. *See Andrus v. Allard*, 444 U.S. 51, 60 (1979); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

Defendant contends first that, because plaintiff's books and records reflect a tax gain when the vessel was sold, plaintiff was not economically harmed by the taking. The fact that there may have been a paper tax gain does not mean the plaintiff did not suffer a temporary taking prior to the vessel's sale, however. In any event, as Ms. Visconty explained, any nominal tax gain was a result of removing the *Atlantic Star* from plaintiff's books. There was no real economic gain to plaintiff.

Defendant next contends that the proceeds from an insurance policy preclude recovery. The Lloyd's of London policy on which defendant relies provided insurance against loss of fishing permits. Defendant has argued throughout this case that plaintiff did not have a property interest in its permits. *American Pelagic I*, 49 Fed.Cl. at 46 (citing *Bradshaw v. United States*, 47 Fed.Cl. 549 (2000); *Hage v. United States*, 35 Fed.Cl. 147 (1996)). It is ironic that it now contends that insurance against loss of those permits prohibits plaintiff's recovery. In any event, the court held that the taking here was the use of plaintiff's boat. *American Pelagic I*, 49 Fed.Cl. at 51.

Defendant's argument misconstrues the purpose of the compensation aspect of the Takings Clause. The Fifth

Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 314 (1987). That condition is just compensation for that which is taken. The proceeds of an owner's insurance policy covering loss do not constitute just compensation from the government, nor does it mean that the government did not cause a complete diminution in value. The government cannot be the beneficiary of an insurance policy for which it did not pay.[29]

Defendant also argues that any loss suffered by plaintiff is a result of its own business decisions. Defendant would have the court find that because plaintiff did not sell its boat as soon as the 1997 Appropriations Act was passed, any subsequent loss was a result of plaintiff's choices. The facts are otherwise. This argument fails to take into account that the 1997 Appropriation Act and the 1998 Appropriations Act were potentially temporary. It was not until the passage of the 1999 Appropriations Act that the revocation of the plaintiff's permits was permanent. Plaintiff's decision to hold the vessel in the interim, while it attempted to avoid any extension of the permit cancellation, and while it sought to make some profitable use, was not unreasonable. Nor has defendant offered evidence that plaintiff turned down any

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[29] In *Shelden v. United States*, 34 Fed.Cl. 355 (1995), the court commented on the collateral source rule as it applied to the taking of plaintiff's mortgage. The court declined to diminish plaintiffs' recovery by the amount of the earthquake insurance which they had purchased on their home. The government could not benefit from the plaintiffs' foresight.

offers to purchase the *Atlantic Star* after passage of the 1997 Appropriations Act.

Finally, defendant argues that if plaintiff had built a different boat, or outfitted the *Atlantic Star* for a different fishery, plaintiff would not have had such a large loss. This is tantamount to criticizing plaintiff for owning something the government wanted to take. We assume defendant does not seriously advance this argument. In sum, the *Lucas* test is met: plaintiff has established the "extraordinary circumstance[] when *no* productive or economically beneficial use" remains. *Lucas*, 505 U.S. at 1017 (emphasis in original).

C. Fair Rental Value

Unlike a permanent taking, a temporary taking deprives the owner not of its property, but the use of its property for a fixed period of time. The owner is entitled to the "reasonable value of the property's use" during the temporary taking. *United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951).

When a taking of property occurs, its owner must be compensated in the amount that was lost as a result of the taking. *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1581 (1990) (citing *First English*, 482 U.S. at 319). It is the duty of the court to determine compensation which places the owner of property "in as good a position pecuniarily as if his property had not been taken." *Yancey*, 915 F.2d at 1543 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)). Compensation, however, is limited to what was actually taken by the government and excludes indirect or remote injuries. See *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945).

Unlike a permanent taking in which the court examines the market value of the fee interest prior to and subsequent to the takings period when determining damages, for a temporary taking it is well settled that the appropriate

measure of compensation is the fair rental value of property. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949). *See also, First English*, 482 U.S. at 314. Were the difference between the market value of the fee before and after the taking the basis for compensation, "there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy." *Id.* The actual value of the property, the owner's initial investment in that property, and any other factors which go solely to the value of the fee interest are therefore irrelevant for purposes of determining fair rental value.

In general, the fair rental value of a property should be determined by market forces. *United States v. General Motors Corp.*, 323 U.S. 373 (1945). A hypothetical analysis is undertaken. The court attempts to determine what two parties making a voluntary exchange would have agreed upon, recognizing that the actual exchange was done under compulsion. *Kimball Laundry Co.*, 338 U.S. at 5-6. However, just compensation may not be reduced to a simple formula, tied solely to available market values. *See United States v. Cors*, 337 U.S. 325, 332 (1949). There may be instances in which the "market value furnishes an inappropriate measure of actual value." *General Motors Corp.*, 323 U.S. at 379. In fact, "when the property is of a kind seldom exchanged, [and] it has no 'market price,' * * * recourse must be had to other means of ascertaining value." *Kimball Laundry Co.*, 338 U.S. at 5-6. In that situation, the court attempts to determine the loss to plaintiff. See *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

Defendant proposes that, because in this case there is no readily ascertainable rental market, plaintiff is left without a remedy under the Takings Clause. Fortunately, the law is not

so unreasonable. As explained in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 256 (1946), "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." *See also Locke v. United States*, 151 Ct.Cl. 262, 267, 283 F.2d 521 (1960). "The ascertainment of value is not controlled by rigid rules or artificial formulae; what is required is a 'reasonable judgment having its basis in a proper consideration of all relevant facts.' " *American-Hawaiian Steamship v. United States*, 129 Ct.Cl. 365, 124 F.Supp. 378 (1954) (citing *The Minnesota Rate Cases*, 230 U.S. 352, 434 (1913)).

Plaintiff bears the burden of proving its loss to a reasonable certainty. *See Foster v. United States*, 2 Cl.Ct. 426, 445 (1983) (citing *United States v. 145.30 Acres of Land*, 385 F.Supp. 699, 702 (W. D. La.1974), aff'd, 524 F.2d 1231 (5th Cir. 1975)). It is entitled, however, to all reasonable inferences which may be drawn from the evidence. *See Locke*, 151 Ct.Cl. at 267-68, 283 F.2d 521 (1960). Moreover, that the inquiry is based on some conjecture is not fatal. *Yaist v. United States*, 17 Cl.Ct. 246, 257 (1989) (citing *United States v. Silver Queen Mining Co.*, 285 F.2d 506 (10th Cir. 1960)). Where there is no market for a piece of property, or one may not be readily discerned, it is the responsibility of the trial court to determine a fair rental value based on other data available. *United States v. Miller*, 317 U.S. 369, 374 (1943) ("Where, for any reason, property has no market, resort must be had to other data to ascertain its value.").

Plaintiff must show that there is a demand for the use which it proposes. *See Fordyce v. United States*, 7 Cl.Ct. 591, 600 (1985). The undeveloped nature of a market for large fishing vessels in the western Atlantic required the court to examine the market for similar vessels elsewhere in

the world. Plaintiff provided ample fact and expert testimony that permits a comparison of the *Atlantic Star* with production and sale by vessels operating in other areas.

Additionally, plaintiff must show that its use of the property was not a speculative or conjectured use. *See United States v. 320.0 Acres of Land*, 605 F.2d 762, 814 (5th Cir. 1979). Here, as discussed *supra*, it requires no speculation to conclude that plaintiff would have successfully used the *Atlantic Star* as a fishing vessel for Atlantic herring and mackerel off the East Coast of the United States.

As explained in *Kimball Laundry*, every takings case involves a counter-factual inquiry—what would willing parties have agreed upon if the government had not intruded, requiring an involuntary exchange. *Kimball Laundry*, 338 U.S. at 6. The absence of a competitive market, while important, does not destroy the court's ability to find damages in this case. Instead, it requires the court to examine additional evidence, provided in this case by Dr. Miller, about what would have transpired if a market had existed. As discussed above, Dr. Miller's model is based on extensive evidence and sound reasoning. The absence of a real-world market for the rental of the *Atlantic Star* does not render Dr. Miller's model speculative.

Because there was no actual rental market for fishing vessels like the *Atlantic Star*, a working model for a competitive market was necessary. This is what Dr. Miller attempted to construct. As explained above, his model provided the court with a probable revenue stream which would closely approximate the fair rental value of the *Atlantic Star* during the takings period. In a competitive market, the revenue stream that the *Atlantic Star* probably could have achieved is equivalent to the amount that a potential lessee would have been willing pay in order to rent the vessel. Basic economic principles dictate that potential

lessees would compete, bidding up to the revenue stream for the *Atlantic Star*. As lessor, then, plaintiff would have been able to realize this rental value but for the taking.

As discussed above, plaintiff put forward a number of highly qualified, competent and reliable witnesses. These witnesses demonstrated that plaintiff could have made a profit from the fishing and subsequent sales of herring and mackerel off the East Coast. The extensive and detailed report from Ms. Visconty more than satisfied plaintiff's burden to show offsetting costs which would have been incurred by the vessel when it was in operation.

Defendant would also have the court find that the component parts of plaintiff's damages model are too theoretical to provide the basis for damages. Specifically, defendant's witness, Mr. Reichle, opined that plaintiff's method of determining prices at which Atlantic herring and mackerel would have been sold during the damages period was speculative. For reasons set out above, however, we do not rely on Mr. Reichle's testimony. Furthermore, plaintiff's expert, Mr. Ellenton, gave a detailed explanation of his pricing method. Far from being speculative, it was based upon years of experience and information published by the Norwegian Seafood Export Council and the Netherlands Central Bureau of Statistics.

Defendant challenges the reasonableness of plaintiff's damages model. Based on Mr. Berdy's testimony, defendant argues that plaintiff's damage claim equates to a 368% return on equity when one begins with what plaintiff invested in the vessel. For the purposes of a temporary taking, however, we are not concerned with plaintiff's initial investment. Neither the purchase price nor the sale price of the *Atlantic Star* have any bearing on the amount to which plaintiff is entitled. This court does not look at the before and after values of a resource in a temporary takings analysis. *Yuba Natural*

Resources, 904 F.2d at 1577. Mr. Berdy's return on equity critique therefore fails as a matter of law. In any event the analysis suffers from another problem. Mr. Berdy based this return on equity only on the amount invested by Mrs. Torgersen. He did not include any equity added by Parlevliet and Van der Plas. Thus, his analysis is incomplete.

Defendant does not propose an alternative method of determining damages. In fact, when asked how he would calculate damages, Mr. Berdy outlined the very method which Dr. Miller used.

Finally, defendant contends that plaintiff has simply provided the court with a request for compensation for lost profits. We disagree. Unfortunately, there is no market from which to determine fair rental value. The net income which the *Atlantic Star* would have generated during the takings period simply provides the basis for calculating a fair market rent. See *Pettro v. United States*, 47 Fed.Cl. 136, 153 (2000) (damages for temporary taking of mineral rights based on probable rental value); *Bass Enterprises Production Co. v. United States*, 48 Fed.Cl. 621 (2001) (plaintiff entitled to interest it would have earned if its right to utilize an oil and gas lease had not been taken). Plaintiff's damage model is therefore permissible.

One adjustment is required, however. Plaintiff's damage model is based solely on an assumed production of 75,000 metric tons per year. We held, however, that plaintiff's damages should be limited to an assumed catch of 50,000 metric tons per year. Although we recognize that cost calculations are not uniformly proportionately driven by the amount of the catch, we find a fair approximation of damages would be two thirds of the amount claimed.

CONCLUSION

We conclude that plaintiff suffered a temporary regulatory taking of all value of its vessel for a twenty month

period. It has established a fair rental value of $37,275,952.67. The clerk is directed to enter judgment in that amount. Costs to plaintiff.

APPENDIX D

In the United States Court of Appeals for the Federal Circuit

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant

No. 03-5101

[December 9, 2004]

ORDER

A petition for rehearing en banc having been filed by the APPELLEE,* and a response thereto having been invited by the court and filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

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* Amicus curiae briefs were filed by the New England Legal Foundation, and the At-Sea Processors Association and Groundfish Forum.

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 16, 2004.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: December 9, 2004

APPENDIX E

Public Law 105-119, 111 Stat. 2440 (Nov. 26, 1997)

* * * * *

SEC. 616. (a) None of the funds made available in this Act may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length or of more than 750 gross registered tons, and that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower–

(1) as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, part 648.12 of title 50, Code of Federal Regulations, and the authorization required under part 648.80(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.); or

(2) that would allow such a vessel to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States (except territories), unless a certificate of documentation had been issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997 and such fishery endorsement was not surrendered at any time thereafter.

(b) Any fishing permit or authorization issued or renewed prior to the date of the enactment of this Act for a fishing vessel to which the prohibition in subsection (a)(1) applies that would allow such vessel to engage in fishing for Atlantic mackerel or herring (or both) during fiscal year 1998 shall be null and void, and none of the funds made available in this Act may be used to issue a fishing permit or

authorization that would allow a vessel whose permit or authorization was made null and void pursuant to this subsection to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States.

* * * * *

Public Law 105-277, 112 Stat. 2681 (Oct. 21, 1998)

* * * * *

SEC. 617. (a) None of the funds made available in this Act may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length or of more than 750 gross registered tons, and that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower–

(1) as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, part 648.12 of title 50, Code of Federal Regulations, and the authorized required under part 648.80(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.); or

(2) that would allow such a vessel to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United (except territories), unless a certificate of documentation had been issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997, and such fishery endorsement was not surrendered at any time thereafter.

(b) Any fishing permit or authorization issued or renewed prior to the date of the enactment of this Act for a fishing vessel to which the prohibition in subsection (a)(1) applies that would allow such vessel to engage in fishing for Atlantic mackerel or herring (or both) during fiscal year 1999 shall be null and void, and none of the funds made available in this Act may be used to issue a fishing permit or authorization that would allow a vessel whose permit or authorization was made null and void pursuant to this subsection to engage in the catching, taking, or harvesting of fish in any other fishery within the exclusive economic zone of the United States.

* * * * *

SEC. 202. STANDARD FOR FISHERY ENDORSEMENTS.

(a) STANDARD.–Section 12102(c) of title 46, United States Code, is amended to read as follows—

* * * * *

"(6) A vessel greater than 165 feet in registered length, of more than 750 gross registered tons, or that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower is not eligible for a fishery endorsement under section 12108 of this title unless

"(A)(i) a certificate of documentation was issued for the vessel and endorsed with a fishery endorsement that was effective on September 25, 1997;

"(ii) the vessel is not placed under foreign registry after the date of the enactment of the American Fisheries Act; and

"(iii) in the event of the invalidation of the fishery endorsement after the date of the enactment of the American Fisheries Act, application is made for a new fishery

endorsement within fifteen (15) business days of such invalidation; or

"(B) the owner of such vessel demonstrates to the Secretary that the regional fishery management council of jurisdiction established under section 302(a)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)) has recommended after the date of the enactment of the American Fisheries Act, and the Secretary of Commerce has approved, conservation and management measures in accordance with such Act to allow such vessel to be used in fisheries under such council's authority.".

* * * * *

Public Law 106-31, 113 Stat. 57 (May 21, 1999)

* * * * *

SEC. 3025. Section 617 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999 (as added by section 101(b) of division A of the Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999 (Public Law 105-277)) is amended–

(1) by striking subsection (a) and inserting the following:

"(a) None of the funds made available in this Act or any other Act hereafter enacted may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length, of more than 750 gross registered tons, or that has an engine or engines capable of producing a total of more than 3,000 shaft horsepower as specified in the permit application required under part 648.4(a)(5) of title 50, Code of Federal Regulations, part 648.12 of title 50, Code of Federal

Regulations, and the authorization required under part 648.80(d)(2) of title 50, Code of Federal Regulations, to engage in fishing for Atlantic mackerel or herring (or both) under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), unless the regional fishery management council of jurisdiction recommends after October 21, 1998, and the Secretary of Commerce approves, conservation and management measures in accordance with such act to allow such vessel to engage in fishing for Atlantic mackerel or herring (or both)"; and

(2) in subsection (b), by striking "subsection (a)(1)" and inserting "subsection (a)".

* * * * *

(4)

Supreme Court, U.S.
FILED
MAY 27 2005
CLERK

No. 04-1252

In the Supreme Court of the United States

AMERICAN PELAGIC FISHING COMPANY, L.P.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the statutory revocation of federal permits that would have allowed petitioner's vessel to conduct fishing operations in the Exclusive Economic Zone surrounding the United States effected a taking of the vessel.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 379 F.3d 1363. The opinion of the Court of Federal Claims addressing liability (Pet. App. 37a-70a) is reported at 49 Fed. Cl. 36. The opinion of the Court of Federal Claims addressing damages (Pet. App. 71a-116a) is reported at 55 Fed. Cl. 575.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2004. A petition for rehearing was denied on December 9, 2004 (Pet. App. 117a-118a). The petition for a writ of certiorari was filed on March 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "[U]ntil the 1960s, most nations with coastlines, including the United States, had declared jurisdiction over territorial seas of three miles and conservation zones of twelve miles." Pet. App. 24a. In 1976, however, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), Pub. L. No. 94-265, 90 Stat. 331, 16 U.S.C. 1801 *et seq.*, which established a much more expansive "fishery conservation zone" around the United States. See Pet. App. 24a-25a. The Magnuson Act in its original form stated that "[t]he inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured." *Ibid.* (quoting 16 U.S.C. 1811 (1976)).

"Subsequently, in a presidential proclamation, President Reagan established the [Exclusive Economic Zone (EEZ)] and assumed sovereign rights for the United States over this two-hundred-mile zone." Pet. App. 25a. As amended in 1986, see Pub. L. No. 99-659, Tit. I, § 101(b), 100 Stat. 3706, the Magnuson Act currently provides that "the United States claims * * * sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." 16 U.S.C. 1811(a); see Pet. App. 25a-26a. The Magnuson Act generally prohibits foreign entities from fishing in the EEZ except pursuant to international fishery agreements, and it authorizes Regional Fishery Management Councils to establish fishery management plans that may include permit requirements for domestic fishermen. 16 U.S.C. 1821, 1824, 1852, 1853; see Pet. App. 27a.

2. In 1996, petitioner's predecessor-in-interest purchased and converted a large vessel, known as the *Atlantic Star*, to catch and process fish, including mackerel and herring. In April 1997, the National Marine Fisheries Service (NMFS) issued to petitioner the permits necessary for the *Atlantic Star* to fish for mackerel. One permit extended to December 31, 1997, and the other extended to April 30, 1998. Petitioner subsequently received an authorization letter, which extended to April 30, 1998, to fish for herring. Pet. App. 4a-5a, 38a-44a.

In both 1997 and 1998, Congress enacted appropriations laws that imposed size and power limitations on vessels conducting fishing operations in the EEZ. Those limitations were made permanent by statute in 1999 and were subsequently incorporated in NMFS regulations. The effect of the size and power restrictions was to cancel the *Atlantic Star*'s existing permits and to preclude the vessel from receiving a permit to fish in any area within the EEZ. At that time, no other vessel was affected by the statutory size and power limits. See Pet. App. 6a-7a, 45a-50a.

After the cancellation of its permits to operate within the EEZ, petitioner attempted to use the *Atlantic Star* in other waters, but its efforts were unprofitable. Petitioner did not attempt to reflag the vessel in order to obtain authorization to fish in a foreign fishery. The *Atlantic Star* was ultimately sold for a profit. Pet. App. 7a-8a; C.A. App. 2090-2091.

3. In March 1999, petitioner brought suit in the Court of Federal Claims (CFC). Petitioner alleged, *inter alia*, that the revocation of its existing NMFS permits and the statutory ban on its conduct of fishing operations within the EEZ effected a taking of its property, for which it was entitled to just compensation under the Fifth Amendment. Petitioner contended that the proper measure of compensa-

tion was the profit that the *Atlantic Star* would have earned through fishing operations if its permits had remained in effect during the 20-month period (November 1997-July 1999) between the enactment of the first appropriations law and petitioner's sale of the vessel. Pet. App. 8a, 70a.

The CFC ruled in petitioner's favor on the issue of liability, holding that petitioner had established a taking of its property. Pet. App. 37a-70a. While expressing "misgivings about the rationale for" the pertinent appropriations laws, the court "assumed that Congress had good and sufficient reasons for revoking only the *Atlantic Star*'s permits." *Id.* at 54a. The court also acknowledged that "[l]icenses or permits are traditionally treated as not protected by the Takings Clause because they are created by the government and can be cancelled by the government and normally are not transferable." *Id.* at 58a.

The CFC observed, however, that "[t]he *Atlantic Star*, *qua* ship, plainly constitutes property for Fifth Amendment purposes." Pet. App. 58a. Relying on this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), the court stated that "the Fifth Amendment contemplates that compensation is owed when government, by regulation, so completely destroys the beneficial uses of property that it is, in effect, idled." Pet. App. 58a. The CFC further held that one "stick in the bundle" of rights associated with petitioner's ownership of the vessel was "the right to use the *Atlantic Star* to fish, subject to regulation." *Id.* at 59a; see *id.* at 62a (concluding that petitioner "possessed a property interest in using its vessel to fish, albeit subject to the regulatory regime").

Having found that the statutory ban on the *Atlantic Star*'s conduct of fishing operations within the EEZ intruded upon petitioner's property interests, the court analyzed petitioner's takings claim under the framework de-

scribed in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (*Penn Central*). See Pet. App. 63a-70a. The court concluded that the government "took [petitioner's] property interest in the use of its vessel to fish for Atlantic mackerel in the EEZ of the United States from the time the 1997 Appropriations Act was enacted until the time [petitioner] sold its vessel." *Id.* at 70a. In a subsequent decision on damages (*id.* at 71a-116a), the CFC held that petitioner was entitled to just compensation of approximately $37 million, which the court found to be the "fair rental value" of the *Atlantic Star* during the relevant time period. *Id.* at 116a.

4. The court of appeals reversed. Pet. App. 1a-36a.

a. On appeal, petitioner "reassert[ed] its contention that it had a legally cognizable property interest in its lawfully issued fishing permits and authorization letter." Pet. App. 15a. Relying on established Federal Circuit precedent, the court of appeals rejected that argument. *Id.* at 15a-18a. The court explained that petitioner never possessed "the authority to assign, sell, or transfer its permits and authorization letter," *id.* at 17a; that petitioner was never "granted exclusive privileges to fish for Atlantic mackerel and herring in the EEZ," *id.* at 17a-18a; and that, under the pertinent NMFS regulations, the government at all times retained the authority to rescind or modify the permits and authorization letter, see *id.* at 17a.

b. The court of appeals also rejected petitioner's contention that the challenged size and power restrictions "effected a taking of the use of the *Atlantic Star* for fishing in the Atlantic mackerel and herring fisheries in the EEZ." Pet. App. 18a; see *id.* at 18a-35a. The court framed the relevant question as whether "the right to fish for Atlantic mackerel and herring in the EEZ [was] a legally cognizable property interest such that it was a stick in the bundle of

property rights that [petitioner] acquired as the owner of the *Atlantic Star*." *Id.* at 22a.

In answering that question in the negative, the court of appeals noted this Court's recognition in *Lucas* of the government's potentially greater degree of control over personal property than over real property. See Pet. App. 23a. The court further explained that the United States' assertion of sovereign control over the EEZ in the Magnuson Act "was already in place by the time [petitioner] purchased the *Atlantic Star*" and "was an 'existing rule' or 'background principle[]' of federal law that inhered in [petitioner's] title to the vessel." *Id.* at 28a (quoting *Lucas*, 505 U.S. at 1029-1030); see *id.* at 30a (Magnuson Act "does not explicitly, or implicitly, preserve any potentially pre-existing common law right to fish in the EEZ."). The court of appeals concluded:

> [B]ecause the Magnuson Act assumed sovereignty for the United States over the management and conservation of the resources located in the EEZ, and specifically over fishery resources, [petitioner] did not have, as one of the sticks in the bundle of property rights that it acquired with title to the *Atlantic Star*, the right to fish for Atlantic mackerel and herring in the EEZ. [Petitioner] thus did not possess the property right that it asserts formed the basis for its takings claim. In the absence of that property right, its claim is fatally defective.

Id. at 35a (footnote omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The cases on which petitioner principally relies—in particular, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001)—involved restrictions on the development of real property that was owned by the takings plaintiffs. As the court of appeals in the instant case observed (Pet. App. 23a), however, this Court has made clear that the takings principles governing regulation of land cannot be applied mechanically to limitations on the use of tangible goods. The Court in *Lucas* explained:

> It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion * * * that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

505 U.S. at 1027-1028 (citations and internal quotation marks omitted).

Thus, the Court in *Lucas* expressly distinguished, with respect to the circumstances under which regulatory action

will effect a taking, between real and personal property. Relying on "the State's traditionally high degree of control over commercial dealings," 505 U.S. at 1027, the Court made clear that the government may ordinarily regulate the use of personal property, without incurring an obligation to pay just compensation, even when the effect of the regulation is to deprive the property of all economic value. The Court specifically declined, however, to adopt a comparable rule with respect to land-use regulation. Insofar as petitioner alleges a conflict between the Federal Circuit's ruling in this case and prior decisions involving the regulation of real property, its claim is therefore without merit.

2. The United States did not appropriate the *Atlantic Star*, physically occupy the vessel, or insist that it be used in an activity beneficial to the government. Nor did the challenged appropriations laws restrict the vessel's freedom of movement anywhere on the world's oceans. Rather, petitioner's sole objection to those laws is that they rescinded the existing permits, and precluded the issuance of new permits, that would have allowed the *Atlantic Star* to conduct fishing operations in the EEZ.

Petitioner's complaint is thus with a regulatory scheme that governs private access to, and exploitation of the natural resources of, a geographic area over which the United States government exercises "sovereign rights and exclusive fishery management authority." 16 U.S.C. 1811(a). The court of appeals and the CFC both held that petitioner had no property right in the fishing permits themselves. See Pet. App. 15a-18a, 58a; see also *Conti* v. *United States*, 291 F.3d 1334, 1341 (Fed. Cir. 2002) (swordfishing permit "falls short of conferring a cognizable property interest"), cert. denied, 537 U.S. 1112 (2003). In this Court, petitioner expressly disavows any challenge to that holding. See Pet. 11 n.4. In arguing that the denial of permission to fish in

the EEZ effected a taking of the *Atlantic Star*, however, petitioner seeks to achieve essentially the same practical result as would be accomplished if the federal permits were treated for Just Compensation Clause purposes as petitioner's property.

In *United States* v. *Rands*, 389 U.S. 121 (1967), this Court considered the measure of compensation owed when the United States condemns privately-owned riparian land adjacent to a navigable river. The Court held that the United States was not required to pay compensation for the increment of the land's value that was attributable to the potential use of the parcel as a port site, because any use of the land as a port was always subject to the government's navigational servitude. See *id.* at 123-125. The Court explained that,

> if the owner of the fast lands can demand port site value as part of his compensation, he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. To require the United States to pay for this value would be to create private claims in the public domain.

Id. at 125 (ellipses and internal quotation marks omitted).

In *United States* v. *Fuller*, 409 U.S. 488 (1973), the Court reached a similar conclusion with respect to permits for grazing livestock on federal lands. The Court held that, when the government condemns land owned in fee simple by private parties, it need not compensate the owner for any incremental value added to the fee lands by the possibility of grazing stock, pursuant to a revocable permit, on adjacent federal property. See *id.* at 490-494. The Court explained that, at least as a general matter,

> the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain. If, as in *Rands*, the Government need not pay for value that it could have acquired by exercise of a servitude arising under the commerce power, it would seem *a fortiori* that it need not compensate for value that it could remove by revocation of a permit for the use of lands that it owned outright.

Id. at 492.

Petitioner's claim for compensation in this case cannot be reconciled with those precedents. The Court in *Rands* and *Fuller* held that, because the government would not be required to pay compensation if it effectively eliminated the use of riparian land as a port site, or revoked a permit for grazing stock on federal property, a fee owner of condemned land would not be entitled to compensation for any increment of value that was contingent on the government's favorable exercise of discretion in those regards. Petitioner nevertheless seeks compensation for the rental value that the *Atlantic Star* would have had if the vessel's permits to fish in the EEZ had remained in effect. As in *Rands* and *Fuller*, "[t]o require the United States to pay for this . . . value would be to create private claims in the public domain." *Rands*, 389 U.S. at 125 (quoting *United States* v. *Twin City Power Co.*, 350 U.S. 222, 228 (1956)).

Contrary to petitioners' suggestion (Pet. 16-17, 19), the court of appeals' decision does not hold or logically imply that the existence of a permitting scheme will invariably bar a claim under the Just Compensation Clause. Very different issues are raised when the government refuses to issue a permit for a landowner to develop or otherwise

make productive use of the takings plaintiff's *own* real property. See, *e.g.*, *Lucas*, 505 U.S. at 1019 (stating, as a general rule, that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, * * * he has suffered a taking"); *Penn Central*, 438 U.S. at 124-128. In the instant case, however, the sole restriction placed upon petitioner's use of the *Atlantic Star* was that petitioner was not permitted to use the vessel to exploit natural resources located within the "exclusive economic zone" of the United States as designated by Congress. Petitioner identifies no case in which a court has awarded compensation under the Fifth Amendment based on the denial or revocation of a permit to engage in profit-making activities on *federal land*, or in an analogous maritime area subject to the federal government's exclusive control.[1]

3. The appropriations laws at issue in this case did not deprive petitioner of "all economically beneficial or productive use" of the vessel. *Lucas*, 505 U.S. at 1015. Petitioner could have sought to reflag the *Atlantic Star* to fish in foreign and international waters, or it could have reoutfitted the vessel to serve in other commercial capacities. Indeed, petitioner used the *Atlantic Star* for research and fishing operations after the pertinent appropriations laws were enacted, see Pet. App. 7a-8a, and it sold the vessel for a

[1] As petitioner observes (Pet. 18 n.7), the federal government also exercises "sovereignty" even over privately-owned fee land within the territorial borders of the United States. The government's authority to regulate the use of such land without the payment of just compensation, however, is limited by historical understandings as to the prerogatives that typically accompany private ownership of real property. A private actor clearly has no comparable expectation of being allowed to exploit natural resources located on federal lands, or in a maritime region designated by Congress as the "exclusive economic zone" of the United States.

profit at the conclusion of the 20-month period for which just compensation was sought, see C.A. App. 2090-2091.

It may be assumed, *arguendo*, that, at least so long as the *Atlantic Star* operated under a United States flag, petitioner could have earned a profit on the vessel's operation only by using the vessel to fish in the EEZ. See Pet. 8. If that was so, however, it would mean that petitioner *chose* to acquire a physical asset that could profitably be used only within the "exclusive economic zone" of the United States, and only pursuant to a federal permit that, under the terms of the pre-existing regulatory scheme, was revocable at any time. Under those circumstances, petitioner's inability to earn a profit on the *Atlantic Star*'s operation is a patently insufficient basis for concluding that revocation of its EEZ fishing permits effected a taking of the vessel.

4. Petitioner contends (Pet. 5-6) that various pronouncements by federal officials encouraged the company to invest in the *Atlantic Star*. As noted, however, petitioner does not argue that NMFS's issuance of permits to fish in the EEZ conferred any property right upon the permit holder. Nor does petitioner contend that either the issuance of the permits, or any other federal action during the relevant period, constituted a binding *contractual* commitment to allow the *Atlantic Star* to conduct fishing operations in the "exclusive economic zone" of the United States. Just as the rights of riparian landowners are subject to the "dominant servitude" held by the United States, *Rands*, 389 U.S. at 123; see *id.* at 125 (noting "the constitutional power of Congress completely to regulate navigable streams to the total exclusion of private power companies or port owners"), petitioner's exploitation of natural resources within the EEZ was at all times "a matter of gov-

ernmental permission, rather than a property right," Pet. App. 29a.[2]

Petitioner also contends (*e.g.*, Pet. 2, 7) that it was singled out for unfavorable treatment and thereby treated unfairly vis-a-vis its competitors.[3] Petitioner further asserts (Pet. 24) that "the legislation lacked a nexus to any conceivable harm to the flourishing fish stocks at issue."[4]

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[2] Petitioner contends that the initial (1997) appropriations law "was unforeseeable under the existing [Magnuson Act] regulatory scheme." Pet. 2 (footnote omitted). The enactment of that law evidently did not take petitioner wholly by surprise, however, since petitioner purchased (and subsequently collected upon) a policy that insured the company against cancellation of its fishing permits. See Pet. App. 108a-109a.

[3] That claim is misconceived. Although no vessel other than the *Atlantic Star* was affected by the relevant appropriations provisions, see Pet. App. 7a, that is because the *Atlantic Star* was the only vessel in actual or contemplated operation in the Atlantic herring and mackerel fisheries that exceeded the statutory size and power limits. See 143 Cong. Rec. 19,489 (1997) (Sen. Snowe) (explaining that the *Atlantic Star* was "more than twice the size of any other vessel currently fishing in New England"). And while petitioner contends (Pet. 7) that it was singled out for exclusion from *other* United States fisheries, there is no evidence that petitioner wished to operate in such fisheries or could have earned a profit doing so. See Pet. App. 52a (CFC states that "[t]he profitability of the *Atlantic Star* depended upon its ability to fish for Atlantic mackerel").

[4] Petitioner suggests (Pet. 7) that the statutory size and power restrictions were explicitly motivated by economic protectionism, and were not defended as efforts to protect the health of the Atlantic herring and mackerel fisheries. The legislative record refutes that contention. In introducing the 1997 appropriations provision, Senator Snowe acknowledged that herring and mackerel stocks were "fairly abundant" at that time. 143 Cong. Rec. at 19,489. She observed, however, that the *Atlantic Star* was "more than twice the size of any other vessel currently fishing in New England," and that "[m]any concerns have been raised from Maine to New Jersey about the

That assertion, however, is not the basis for a takings claim, see *Lingle* v. *Chevron U.S.A. Inc.*, No. 04-163 (May 23, 2005), and petitioner does not challenge the relevant appropriations laws under the Due Process Clause of the Fifth Amendment or its equal protection component. It is therefore appropriate to "assume[]," as did the CFC, "that Congress had good and sufficient reasons" for crafting those laws in the manner that it did. Pet. App. 54a.

5. Contrary to petitioner's contention (Pet. 24-26), consideration of the factors identified by this Court in *Penn Central* as having "particular significance" in regulatory takings analysis—*i.e.*, the "economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the governmental action," 438 U.S. at 124—reinforces the Federal Circuit's conclusion that no taking occurred in this case. Petitioner's ultimate sale of the *Atlantic Star* at a profit refutes the contention

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potential impacts that this enormous vessel will have on the herring and mackerel stocks, and on the composition of the fisheries that have been developing in recent years through the hard work of many people in the region." *Ibid.* Senator Kerry, who co-sponsored the bill, similarly recognized the "current health of Atlantic herring and mackerel stocks" but warned that "[t]he challenge now is to prevent a flood of new or displaced boats from entering the herring fishery and overwhelming the harvesting capacity of the resource." *Id.* at 19,490. Senator Kerry further explained:

> [NMFS] estimates that herring stocks are now at levels that would support an expanded harvest level. However, New England's past has taught us that in an unregulated environment, this current healthy condition could rapidly be reversed. Given the present lack of a Federal fishery management plan for herring and questionable scientific information on the status of the stocks, the uncontrolled expansion of this fishery could have devastating consequences.

Ibid.

(Pet. 25) that "the economic impact [of the appropriations laws] on petitioner was devastating." Nor did the revocation of petitioner's fishing permits disappoint any legitimate "investment-backed expectations." *Ibid.* Well before petitioner purchased the *Atlantic Star*, Congress had asserted "sovereign rights and exclusive fishery management authority over all fish" within the EEZ, 16 U.S.C. 1811(a), and the regulatory scheme made clear that petitioner's permits were revocable at any time. Petitioner's purchase of insurance against the very regulatory action that formed the basis of its takings claim (see note 2, *supra*) further demonstrates that no substantial disruption of its legitimate expectations occurred.

Finally, there is no basis for petitioner's contention (Pet. 24-25) that the "character" of the challenged governmental action supports petitioner's takings claim. In discussing that factor, the Court in *Penn Central* observed that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124 (citation omitted). Far from effecting a "physical invasion" of petitioner's property, the appropriations laws at issue here restricted only a single use of the *Atlantic Star*, and they applied only within the "exclusive economic zone" of the United States. Contrary to petitioner's contention (Pet. 24), moreover, those laws did not operate retroactively in the sense of attaching onerous consequences to conduct undertaken before the laws' enactment. Rather, the appropriations laws simply precluded the *Atlantic Star* from fishing in the EEZ after the first of those laws took effect, based on the size and power of the vessel as then configured.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER

The Federal Circuit ruled that a property owner is not entitled to a takings analysis when government deprives property of economic value pursuant to a previously declared "sovereign right" to regulate. Although the government agrees, its brief in opposition confirms that the ruling conflicts with controlling precedent on a critical federal question.

The petition (at 11-16) detailed how the Federal Circuit's ruling that regulated property is not property conflicts directly with this Court's decisions in *Lucas* and *Palazzolo*. The government's only response is to observe that *Lucas* and *Palazzolo* involved real property rather than personal property like the vessel at issue here. Opp. 7. The proffered distinction is nonviable. As explained below, the Court long has applied the Takings Clause to non-real property. There is no principled basis for exempting non-real property from the principles set forth in *Lucas* and *Palazzolo*: many uses of real property also are "a matter of governmental permission." Opp. 12-13. The extreme nature of the government's view—that the Takings Clause applies only to "real property" (Opp. 11), making the government immune from takings liability for adopting laws that deprive personal property of "all economic value" (Opp. 8)—illustrates the urgent need for clarification of the nature of property rights subject to the Takings Clause.

As the government's opposition makes clear, the importance of the federal question—whether the government may eliminate property interests by legislatively declaring its "sovereign right" to regulate property uses prior to adopting confiscatory regulations—cannot be denied. Although the government disputes that the ruling would eviscerate ***real*** property rights, it ***agrees*** that this is the consequence for ***personal*** property rights. Opp. 8. Thus, even as interpreted by the government, the ruling below would work a stunning revision of regulatory takings jurisprudence.

Even if the scope of the ruling were limited to personal property situated ***identically*** to the *Atlantic Star*—*i.e.*, to personal property used in public spaces subject to the government's "sovereign rights" (though neither the Federal Circuit nor the government suggests any such limitation)—the consequences would be intolerable. At minimum, the ruling forbids any takings analysis when the government restricts or bans use of any fishing vessels, oceanliners, trucks, and airplanes, all of which operate in public spaces subject to the government's "sovereign rights" or sovereignty (the EEZ, internal waters, federal highways, and U.S. airspace). The ruling thus imperils the security of hundreds of billions of dollars of business investments—a point to which the government offers no response. See NAHB/NSWMA Amicus Br. Such insecurity can only discourage investment in such vital sectors of our economy as the transportation and fishing industries. Cf. Giammarino & Nosal, *Loggers Versus Campers: Compensation for the Taking of Property Rights*, 21 J. L. Econ. & Org. 136, 151 (2005); Bell & Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531, 607 (2005). The Court should not permit this radical revision of established law and the economic destabilization that it will cause.

I. The Opposition Confirms The Petition's Showing That The Ruling Below Conflicts With The Court's Precedents On An Important Federal Question.

1. Although the Federal Circuit acknowledged that APFC had a property interest in its vessel, it held that APFC did not have a property interest in the only viable use of its vessel. Citing this Court's decision in *Lucas*, the court reasoned that Congress's adoption of the Magnuson Act in 1976, subjecting previously unrestricted fishing to U.S. sovereign regulatory authority, was a "background principle" of law that eradicated any property interest that vessel owners might previously have had in using their vessels to fish. App. 28a. According to the Federal Circuit, the 1976 enactment enabled

the government thereafter to adopt unforeseeable, economically devastating fishing restrictions with immunity.

The government makes no effort to defend this gross misinterpretation of the Court's holding in *Lucas* regarding which existing laws act as "background principles" excluding a property use from an owner's title. No defense is possible; the ruling below cannot be reconciled with *Lucas*. As the petition showed (at 3-4, 11-12) and the government does not contest, *Lucas* held that an existing law is not such a "background principle" unless it "***always*" *proscribed the particular use at issue.*** 505 U.S. at 1029-1030 (emphasis added). As the Federal Circuit expressly acknowledged, neither the Magnuson Act nor its implementing regulations ***ever*** proscribed the use at issue here. "[U]se of the *Atlantic Star* to fish was lawful not only under traditional property and nuisance principles, * * * but also under the regulatory regime by which its permits were issued." App. 21a-22a.

Moreover, the Magnuson Act did not make the legislation that idled the *Atlantic Star* ***foreseeable***. See Pet. 13-14. And *Palazzolo* held that even if a preexisting regulatory scheme ***did*** make adoption of a use restriction foreseeable, that does not foreclose a takings analysis, as the Federal Circuit held here. Rather, preexisting regulation merely factors into the reasonableness of the owner's expectations under the *Penn Central* analysis. The ruling below thus is irreconcilable not only with *Lucas*, but also with *Palazzolo*.[1]

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[1] Moreover, the Magnuson Act cannot have eliminated vessel owners' property rights because it merely provided the government with regulatory authority and thus was not challengeable as a taking. "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property"; rather, a takings claim would be ripe "[o]nly when a permit is denied." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). Now that the government has actually applied its regulatory authority to restrict fishing access and a property owner has a ripe takings claim, the government denies liability on the ground that its unchallengeable prior declaration of a right to regulate eliminated any compensable property interest. Such a

2. Rather than contend that the Federal Circuit's "background principles" ruling is consistent with *Lucas*, the government argues that *Lucas* is inapplicable to non-real property. Opp. 7-8. But that cannot be right because the Court specifically applied *Lucas*'s "background principles" analysis to non-real property in *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 168 (1998). See Pet. 11.

Ignoring *Phillips*, the government invokes the observation in *Lucas* that a personal property owner should be aware that regulation may "render his property economically worthless." Opp. 7, quoting *Lucas*, 505 U.S. at 1027-1028. But *Lucas* never suggested that personal property is ***categorically*** excluded from Takings Clause protection, as the government argues. The scope of a personal property owner's expectations necessarily varies from case to case and thus must be examined under the reasonable expectations prong of the *Penn Central* test. Indeed, the Court repeatedly has applied a takings analysis to such non-real property as ships, *United States* v. *Cors*, 337 U.S. 325 (1949); trade secrets, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984); liens, *Armstrong* v. *United States*, 364 U.S. 40 (1960); and bank interest, *Phillips*, *supra*; *Webb's Fabulous Pharms.* v. *Beckwith, Inc.*, 449 U.S. 155 (1980). Non-real property, even if something less than a "fee simple," is not "something less than property." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 76 (1982). Owners of real and personal property alike have a property interest in using their property in any manner not foreclosed by background principles of existing law, subject to non-confiscatory governmental use regulations. *Lucas*, 505 U.S. at 1029. Whether particular use regulations are confiscatory can be assessed only by the takings analysis the Federal Circuit foreclosed.

3. The government also denies that a property right can

Catch-22—where neither the declaration of authority to regulate nor the confiscatory regulation itself can give rise to a takings claim—is plainly not what the framers of the Takings Clause had in mind.

exist in "a geographic area over which the United States government exercises 'sovereign rights.'" Opp. 8. As the government recognizes, however, acceptance of this principle would preclude private property rights in all "privately-owned fee land within the territorial borders of the United States," as well as in all federal lands and the EEZ. Opp. 11 n.1. The government asserts an exception for real property but offers no principled basis for reducing the Takings Clause to a real property provision. It purports to rely on "historical understandings as to the prerogatives that typically accompany private ownership of real property" (*ibid.*) but disregards comparable "historical understandings" authorizing personal property to be used, subject to nonconfiscatory government regulation, in a manner not foreclosed by background principles of law. The right of vessel owners to fish in ocean waters, for example, was recognized at common law and indeed has been since ancient times. Pet. 12 n.5; H.R. Rep. No. 94-445, at 24 (1975) (recognizing longstanding right to "free and open access to all stock on the high seas"). Further, the government completely disregards the Court's numerous takings analyses of restrictions on non-real property (Pet. 17) and the lower courts' consistent rejection of arguments that personal property lacks Takings Clause protection. *E.g.*, *Pittman* v. *Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (Posner, J.); *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992) (Edwards, J.).

Why has the government adopted such an extreme position? It undoubtedly recognizes that if the Takings Clause applies to personal property, the ruling below cannot be sustained. Petitioner was entitled to a *Penn Central* analysis of the legislation that grounded its fishing vessel.

4. To avoid that conclusion, the government also tries to confuse the nature of the property interest asserted by petitioner. The government recognizes that petitioner claims a property interest not in its permits but in its vessel. Opp. 8-

9. But it contends that petitioner seeks the "same practical result" as if it were claiming a property interest in its permits. Opp. 9. That is not true. Petitioner seeks compensation not only for abrogation of the *Atlantic Star*'s permits but also for its banishment from fishing anywhere in the EEZ. See Pet. 7. Moreover, the government's argument applies to ***any*** property interest whose use requires a permit. Yet that has not prevented the Court from performing takings analyses on numerous claims involving denials and revocations of permits. See Pet. 17 (listing cases).

5. The government's reliance on *United States* v. *Rands*, 389 U.S. 121 (1967), and *United States* v. *Fuller*, 409 U.S. 488 (1973) (Opp. 9-10), is misplaced. Neither involved the question at issue here—the existence of a compensable property interest. Both were direct condemnation cases in which the issue was not takings liability but rather how to value the just compensation to which the plaintiff was unquestionably entitled. In *Rands*, the question was whether an owner whose land was condemned for use as a power plant was entitled to the value of the land used as a power site or instead to an enhanced value based on the ***potential*** use of the land as a port site. 389 U.S. at 121. The Court ruled that compensation was limited to the value of the land in its actual use as a power site. *Id.* at 127. Similarly, in *Fuller*, the Court held that a landowner was entitled to the value of his condemned fee land but not to an enhanced value for use in combination with adjacent land "owned outright by the Government" and leased by the landowner. 409 U.S. at 493. Here, unlike in *Rands*, petitioner claims a taking of an ***existing*** property interest in its vessel and seeks as compensation only the value of the actual lost use. And unlike in *Fuller*, petitioner seeks no enhanced value but only the actual use value lost due to the vessel legislation, just as the owner in *Kimball Laundry*, 338 U.S. at 14, was entitled to the actual use value lost due to the taking of his laundry.[2]

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[2] The government incorrectly suggests that no cases have found a taking

Moreover, unlike the government land in *Fuller*, the EEZ is not "owned outright" (409 U.S. at 493) by the Government—the government does not own the EEZ at all but merely exercises sovereign rights to regulate it.[3]

6. The government agrees with the ruling below that owners who "choose" to acquire personal property that can "profitably be used" only "pursuant to a federal permit" forfeit any claim to a compensable property interest. Opp. 12. But the same could be said of any investment in planes, telecommunications switches, or coal-fired generators, all of which are subject to regulation and require a permit to operate. Indeed, in each of the many cases recognizing compensable property rights in regulated property (see Pet. 17, 19), the owner "chose" to invest in property that could "profitably be used" only if a permit was issued. That has never been a ground for foreclosing a takings analysis. As the Court of Federal Claims succinctly observed: "To say that the plaintiff's rights to fish were subject to a pervasive regulatory scheme—plainly they were—is not to say that

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of private property used in a "maritime area subject to the federal government's exclusive control." Opp. 11. One such case is *Pete* v. *United States*, 531 F.2d 1018 (Ct. Cl. 1976), which awarded just compensation for a regulatory taking of a vessel used in federally regulated waters within a national park. Another is *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 336 (1893), which found a taking of a right to obtain tolls from locks constructed on navigable waters despite the government's "supreme control" over commerce and navigation.

[3] The U.S. asserts only limited "sovereign rights" in the EEZ (16 U.S.C. § 1811), which are "rights for specific purposes and thus do not permit a state to exercise full powers over these areas, as 'sovereignty' might allow." Brilmayer & Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. Int'l L. & Pol'y 703, 703 n.2 (2001). As the Governance Working Group of the U.S. Commission on Ocean Policy has explained, the U.S. has not asserted "broad control" over the EEZ "in the same way that we have asserted responsibility for onshore public lands." http://oceancommission.gov/commission/groups/governance.html; see also NELF Amicus Br. 6-14. Hence, the government's claim that the EEZ is "analogous" to federal land with respect to personal property use therein (Opp. 15) is misplaced.

nothing the government did with respect to those rights could ever implicate the Takings Clause." App. 59a.

The government's view that APFC had no compensable property interest because the *Atlantic Star* was designed specifically for mackerel fishing (Opp. 13 n.3) is equally misplaced. APFC designed its vessel for mackerel fishing in response to the government's ***requests*** that American fishermen utilize large vessels for mackerel fishing. Pet. 5-6. And in an economy that rewards specialization, property commonly is designed for specialized uses. Is coal mining equipment not "property" simply because its only viable use is coal mining? Again, the vast swath of compensable property rights abolished by the ruling below is startling.

7. In sum, there is an urgent need to clarify the scope of property interests subject to takings claims. Whether recently enacted legislation establishing regulatory authority, like the Magnuson Act, can constitute a "background principle" eradicating compensable property rights in regulated uses; and whether the Takings Clause applies to personal property, to property whose use requires a governmental permit, or to property used on lands or waters over which the government asserts sovereignty or sovereign rights—these are important threshold questions that, as the ruling below and the government's brief in opposition make abundantly clear, urgently require answers and guidance from this Court.

II. Based On The *Penn Central* Factors The Trial Court's Ruling Should Have Been Affirmed.

The government argues that, assuming a compensable property interest, there was no taking. But as the trial court found, each prong of the *Penn Central* test supports a taking.

Economic Impact. The trial court found—both on summary judgment on liability and after an extensive trial on damages—that the appropriations legislation deprived the *Atlantic Star* of all economically viable use. Pet. 9, 25. The government disagrees, contending that petitioner could have

tried to reflag its vessel to fish in foreign waters, "reoutfitted the vessel" for other purposes, or used it for "research." Opp. 11. But the trial court found each of these contentions refuted by the evidence, which showed that none of these options was economically viable. App. 51a-53a, 89a-90a.

The government also repeatedly claims that APFC ultimately sold the vessel "for a profit." Opp. 5, 16, 20. That is simply wrong. Because it had been barred from U.S. fisheries for over a year-and-a-half, the *Atlantic Star* was accumulating not fish but debts, and creditors were threatening to arrest the vessel. CA App. 617, 4083-4084. To save their investment, APFC's Dutch partners (who had fishing rights in E.U. waters not available to APFC) obtained the vessel in a forced sale and assumed APFC's debts. See App. 88a; CA App. 814, 3503, 3605, 3611. As the trial court found, "[t]here was no real economic gain to plaintiff." App. 108a. Furthermore, a subsequent sale is irrelevant to whether there was a temporary taking. Whether the owner in *Kimball Laundry* sold his laundry after recovering it was not a factor in the Court's ruling that he was entitled to the full rental value he lost due to the temporary taking. See 338 U.S. at 7.

Reasonable Expectations. The government contends that petitioner's expectation of operating the *Atlantic Star* was unreasonable because "petitioner's permits were revocable at any time." Opp. 15. In fact, the regulations ***barred*** revocation except for cause, indisputably absent here. See 50 C.F.R. § 648.4(h); 15 C.F.R. § 904.300(a). In any event, the National Marine Fisheries Service did not revoke the permits. It took special legislation to bar the *Atlantic Star* from fishing in U.S. waters. As the trial court found, no one could have foreseen such legislation. App. 63a-66a; Pet. 25. The government's longstanding policy of compensating vessel owners when restricting fishing rights (Pet. 6) further supports the reasonableness of APFC's expectations (and evinces the government's recognition that property rights were at stake).

The government says that petitioner must have foreseen the legislative ban because it insured against cancellation of its permits (Opp. 13 n.2, 15), a contention considered and rejected by the trial court (App. 108a). APFC obtained insurance only at the insistence of a prospective lender. In any event, the "possibility of indemnification" has never precluded a takings claim. See *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 531 (1998).

Nature of the Governmental Action. The government argues that the *Atlantic Star* was not "singled out for unfavorable treatment" but just happened to be the only vessel that exceeded the new size limits. Opp. 18 n.3. That is false. Other vessels exceeded the size limits but they, unlike the *Atlantic Star*, were grandfathered. Pet. 7. Moreover, "regulations that are intended to single out an individual for adverse treatment may be hidden behind language of general applicability," which "was the situation in *American Pelagic*." Penalver, *Regulatory Takings*, 104 Colum. L. Rev. 2182, 2225 (2004). Indeed, competitors developed the new limits specifically to exclude the *Atlantic Star* but not their own vessels. Pet. 6.[4]

Finally, statements by the legislation's sponsors that it was directed at possible future harm (Opp. 13 n.4) do not bear on whether it effected a taking. Whether its "public use" was prevention of future harm or economic protectionism, the legislation required a single property owner to bear burdens more properly borne by the public as a whole—precisely the type of governmental action for which the Constitution requires just compensation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] The government's reliance on lack of a "physical invasion" (Opp. 15) also is misplaced. It is well settled that regulation may be "so onerous that its effect is tantamount to a direct appropriation." *Lingle* v. *Chevron U.S.A. Inc.*, 2005 WL 1200710, at *7 (U.S. May 23, 2005).

Respectfully submitted.

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In The

Supreme Court of the United States

AMERICAN PELAGIC FISHING COMPANY, L.P.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Federal Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS AND NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The National Association of Home Builders ("NAHB") and the National Solid Wastes Management Association ("NSWMA") have received the parties' written consent to file this brief as *amici curiae* in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 220,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB is the voice of the American shelter industry.

Throughout the United States, NAHB's members hold and develop property that is subject to a myriad of local, state and federal regulations. In the case below, the Federal Circuit did not conduct a Fifth Amendment takings analysis under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) because it found that the regulation that the Petitioner claimed caused the taking had removed any protectable property interest. As owners of real property, NAHB's members are concerned that the lower court's decision could negatively impact their property rights and diminish their protections under the Fifth Amendment.

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[1] Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation.

NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)2; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 697 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004); *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846, *cert. granted*, 125 S. Ct. 314 (2004); and *San Remo Hotel, L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), *cert. granted in part*, 125 S. Ct. 685 (2004).

NSWMA is a trade association representing for-profit companies in North America that provide solid, hazardous and medical waste collection, recycling and disposal services, and companies that provide professional and consulting services to the waste services industry. Founded in 1962, NSWMA's members operate in all 50 states and the District of Columbia.

The ruling below that there can be no property right associated with an area subject to government regulation or authorization has sweeping ramifications for the solid waste industry. Throughout the United States, thousands of solid waste companies collect, process and dispose solid waste under licenses or other authorizations provided by state or local governments. This essential public service is performed daily, in a cost-effective, environmentally protective manner, subject to applicable regulations. *See* 42 U.S.C. § 6901, *et seq.* (Resource Conservation and Recovery Act). Solid waste companies invest hundreds of millions of dollars each year in capital improvements (e.g., newer and more environmentally friendly vehicles, expanded processing and disposal facilities).

If Congress can pass a law abrogating American Pelagic's right to use its property without triggering a takings analysis, then solid waste companies throughout the United States are little more than at-will employees who can be dismissed for good cause, bad cause, or no cause at all. *See* 82 Am. Jur. 2d Wrongful Discharge § 1 (2004) (providing that at-will employees may be discharged for "any reason or for no reason"); Wendy Wunsh, *The "Seinfeld Case Tempts Litigation, But Employers Remain "Masters of Their Domain,"* 15 Lab. Law. 265, 272 (1999) (explaining that the traditional rule of employment allows "at-will"

employees to be discharged "for good cause, bad cause or no cause at all."). A local government would be completely free to revoke a solid waste company's license to collect residential or commercial waste, for example, and replace that company with its own municipal collection. In a few states, laws have been passed that require local governments to provide advance notice of such action, and provide limited compensation to affected companies. *See, e.g.*, Mo. Rev. Stat. § 260.247 (2004). However, these limited rights under state law should not abrogate a local government's obligation to pay just compensation for the taking of a solid waste company's personal property. The type of confiscatory regulations authorized by the decision below threaten the livelihood of many solid waste companies.

SUMMARY OF THE ARGUMENT

The Federal Circuit failed to follow this Court's case law when it analyzed whether American Pelagic had "private property" that was protected by the Fifth Amendment's Takings Clause. First, the court has incorrectly conflated the tests for determining whether a claimant has protectable property with whether the government has taken the property. Second, the Federal Circuit failed to heed the Court's decisions in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 533 U.S. 302 (2002), ("*Tahoe-Sierra*") and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) ("*Penn Central*"). The Federal Circuit incorrectly disaggregated the property at issue, the *American Star*, into specific property rights (i.e. the right to use, the right to exclude others) and focused its analysis of whether the Petitioner had constitutionally protected private property on one fraction of one right.

ARGUMENT

I. The Federal Circuit Incorrectly Joined the "Takings" Analysis With the "Property" Analysis.

When a court examines whether a government action violates the Takings Clause of the Fifth Amendment, there are three discrete questions that the court must address:

1) Does the plaintiff have a property interest in "private property" (the "property" analysis);
2) Has the government "taken" the "private property" (the "takings" analysis); and
3) Has the government provided "just compensation" (the "just compensation" analysis)?

See, e.g., Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 115, 160 (1980) (explaining that the questions of whether just compensation had been paid and whether the claimant had private property were clear). Each of these questions requires a different analysis. For example, in *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the sole issue addressed was whether the interest earned on client funds held by attorneys in IOLTA[2] accounts is "private property." In deciding that the interest is the "private property" of the client, the Court looked to "existing rules or understandings that stem from an independent source such as state law" and the "fundamental maximum of property law . . . ." *Id.* at 164, 167. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("*Penn Central*"), however, makes clear that there are three factors that inform a "takings" analysis; the economic impact of the government's regulation, the

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[2] Interest On Lawyer Trust Accounts.

character of the government's actions and the extent to which the government's action has interfered with distinct investment backed expectations. Finally, it is settled that in conducting a "just compensation analysis," a court should reimburse a property owner for the property interest taken and that valuation of the interest should be based on fair market value. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1960).

The court below has incorrectly blended the threshold question of whether the plaintiff has a property interest in private property with the analysis of whether the government has committed an action that renders it liable for a taking.

The Federal Circuit began its analysis by citing *Andrus v. Allard*, 444 U.S. 51 (1979), for the proposition that because of the government's "high degree of control over commercial dealings" the Petitioner should have been aware a "new regulation might [] render his property economically worthless." *American Pelagic,* 379 F.3d at 1377 (quoting *Andrus*, 444 U.S. at 66-67). Furthermore, the court below evaluated whether American Pelagic should have a "lower expectation" to use its property because the *American Star* is not land. *Id.* The lower court's reliance on *Andrus* evidences an improper mixing of the property and takings analyses, for in *Andrus*, the Court did not address whether a constitutionally protected property interest existed. Rather, the *Andrus* court was singularly concerned with whether the regulation at issue amounted to a taking of private property. In addition, by considering American Pelagic's "expectations" to use its property in determining whether it had a protectable property interest, the lower court has incorrectly imported one of the *Penn Central* factors into the property analysis.

Moreover, in *Tahoe-Sierra*, 533 U.S. 302, 331, the Court explained that "defining [a] property interest taken in terms of the very regulation being challenged is circular." When determining whether American Pelagic had protectable property, however, the lower court examined the entire statutory and regulatory scheme that American Pelagic claimed was responsible for taking its property. The Federal Circuit described the history of the federal government's regulation of the exclusive economic zone from the 1976 enactment of the Magnuson-Stevens Act, through the 1983 establishment of the Exclusive Economic Zone ("EEZ"), through the 1986 amendment of the Magnuson-Stevens Act. *American Pelagic*, 379 F.3d at 1377. Hence, the court relied on the statutory/regulatory scheme[3] that caused the taking to determine that American Pelagic did not have a protectable property interest.[4] This

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[3] The Magnuson-Stevens Act, and the fishing permits that the National Marine Fisheries Service requires pursuant to it, restricted the use of the *American Star*. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 842 n.2 (1987) (explaining that using one's property, even though it may be "subjected to legitimate permitting requirements," cannot be described as a governmental benefit).

[4] Examination of the statutory/regulatory scheme in the property analysis also contradicts *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In *Palazzolo*, the Petitioner claimed the State's wetlands regulations had taken his property. Id. at 615. The State argued that the Petitioner acquired the property after the wetlands laws were enacted and thus the Petitioner was foreclosed from claiming that the regulation caused a taking. In Justice O'Connor's concurrence, she explained that the temporal relationship between the acquisition of title and the enactment of a regulation is not immaterial, but it should be considered when a court is examining the reasonableness of the claimant's

approach improperly unites the "property" analysis with the "takings" analysis and fails to observe the Court's counsel in *Tahoe-Sierra*.

Courts must generally conduct "ad hoc, factual inquiries," when faced with a Fifth Amendment regulatory takings claim. *E.g., Penn Central,* 438 U.S. at 124 (1978). And this Court's precedent has created a framework to guide that analysis. By combining the analysis of whether a claimant has protectable private property with whether the government has taken the property, the Federal Circuit has disregarded the Court's framework.

II. The Federal Circuit Disregarded This Court's Decisions Concerning The Dissection of Property Into Separate Parts.

Ownership of property is a "bundle of rights." *E.g., Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Among these rights are the right to use, to dispose of, and to exclude others from the property. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945). In determining whether American Pelagic had a Fifth Amendment interest in private property, the court below focused on one fraction of one right[5] ("the right to fish for Atlantic mackerel and herring in the EEZ") to conclude that American Pelagic did not have a basis of a takings claim. *American Pelagic*, 379 F.3d at 1376. By carving the plaintiff's property into such small segments, the Federal

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investment backed expectations as part of the takings analysis. *Id.* at 633.

[5] One right in the bundle is the right to use property. The right to use property in a specific place in a specific way is a fraction of the right to use property.

Circuit contradicted this Court's decisions in *Penn Central* and *Tahoe-Sierra*.

In *Penn Central,* the owner and lessee (property owners) of the Grand Central Terminal challenged the application of New York's Landmarks Preservation Law (Preservation Law) to its property. The property owners wished to construct a new building on their property that was cantilevered over the terminal. Pursuant to the Preservation Law, the City denied the property owners' request. In arguing that the City had "taken" its property, the property owners claimed that the airspace above the terminal was valuable property and that the law deprived them of any gainful use of their "air rights" above the terminal. *Penn Central,* 438 U.S. at 130. Disagreeing with the property owners, the Court explained: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* Thus, in *Penn Central*, the Court ruled that when courts conduct a takings analysis, it is not proper to divide the "property" into its natural features and then focus the analysis on only one of those features.

Similarly, in *Tahoe-Sierra*, 535 U.S. 302, the Tahoe Regional Planning Agency imposed two development moratoria totaling 32 months in an area around Lake Tahoe, Nevada. Local property owners brought a facial challenge to the moratoria claiming the regulation, though temporary, denied the owners "all viable economic use of" their property while it was in effect. *Id.* at 320.

In *Tahoe-Sierra*, the property owners argued that the Court should "sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether

that segment [had] been taken in its entirety by the moratoria." The Court, however, explained that an "interest in real property is defined by the metes and bounds that describe its geographic dimensions and the terms of years that describes the temporal aspect of the owner's interest." Furthermore, the Court provided that it was incorrect to "disaggregate the petitioner's property into temporal segments corresponding to the regulations at issue . . . ." *Id.* at 331. Therefore, in conducting its "takings" analysis, the Court held that it must look at the property in question "*in its entirety.*" *Id.* (emphasis added).

Thus, both *Tahoe-Sierra* and *Penn Central* stand for the proposition that when conducting the "takings" analysis it is incorrect to divide or separate the property in question into either its natural features or temporal elements and then determine whether the government has taken the division.

The Petitioner owned the *American Star*. To determine whether American Pelagic had a property interest in private property, the court below asked: "Was the right to fish for Atlantic mackerel and herring in the EEZ a legally cognizable property interest such that it was a stick in the bundle of rights that American Pelagic acquired as the owner of the *Atlantic Star*?" *American Pelagic*, 379 F.3d at 1376. Prior to asking this question, however, the court had recognized that the government conceded that the *Atlantic Star* was "property" and that American Pelagic had an interest in the property. *Id.* at 1376 n. 15. That should have been the end of its "property" analysis. Instead, however, the court "disaggregated [petitioner's] property" into the sub-right of using the *American Star* to catch specified fish in a particular area. *Tahoe-Sierra*, 535 U.S. at 1483. By dividing property "into discrete segments" and failing to look at it "in its entirety," the Federal Circuit has

contradicted this Court's teachings in *Tahoe-Sierra* and *Penn Central.*

CONCLUSION

The Federal Circuit has disregarded this Court's precedent by conflating the questions of whether the Petitioner has constitutionally protected property in the *American Star* with whether the government should be liable for taking said property. Furthermore, inconsistent with this Court's decisions in *Tahoe-Sierra* and *Penn Central,* the court below failed to conduct its property analysis on the property in its entirety, and instead focused only on part of one stick in American Pelagic's "bundle of rights."

It is important for the Court to grant certiorari to ensure that the definition of "property" is not narrowed by the property analysis that the Federal Circuit has created in *American Pelagic.*

DATED: May 23, 2005

Respectfully submitted,

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(5)

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In the
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Respondent.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Federal Circuit

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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May 27, 2005

QUESTIONS PRESENTED

Amicus Curiæ New England Legal Foundation supports this Court's consideration of the questions presented by Petitioner American Pelagic Fishing Co., L.P. ("American Pelagic"):

1. Whether the government's authority to regulate a traditional property use is a "background principle" that excludes such a use from the owner's title and allows the government to restrict or abolish the use without ant risk of takings liability.

2. Whether special legislation that targeted a single property owner, deprived that owner's property of all economically viable use, and defeated that owner's reasonable investment-backed expectations was a taking requiring the government to pay just compensation, as the trial court held on an undisputed factual record.

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views and the views of its supporters concerning the need to protect investment-backed expectations and property rights generally from the unanticipated effects of regulatory change in a highly regulated environment.[1]

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of

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1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioner nor Respondent authored this Brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief.

corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance in regulation of private property. Many of NELF's members are engaged in industries historically regarded as heavily regulated industries, such as public utilities, banking, and insurance. Protection of long-standing expectations, such as the expectation that, even in heavily regulated industries, investments will enjoy reasonable protection in the event of changing regulatory requirements, is essential to encourage investment in regulated property.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2] *Amicus* believes that serious negative consequences for business investment will flow from the decision of the Court of Appeals in this matter. *Amicus Curiæ* therefore believes that this brief provides an additional perspective which may aid the Court in determining whether to grant this petition for a writ of *certiorari*. Pursuant to

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2 *See, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (U.S. 2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Supreme Court Rule 37.2 (a), counsel for *Amicus* has submitted consents by both parties to the filing of this Brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioner American Pelagic Fishing Co., L.P. ("American Pelagic").

SUMMARY OF ARGUMENT

This petition for *certiorari* to the United States Supreme Court deals with the ability of the Government, by retroactive legislation, to strip an owner of property rights without just compensation simply because the owner invested in a regulated industry. The decision below determined that the Magnuson Act, 16 U.S.C. §§ 1801–18, precluded American Pelagic's inclusion of the right to fish in the United States Exclusive Economic Zone ("EEZ") in its bundle of rights in its vessel the *Atlantic Star*. The right of the owners of a fishing vessel to use the vessel to fish is a specific example of the general right to use. The decision below abrogated historic common fishing rights in the high seas, relying solely on the Government's 1986 statutory claim of "sovereign rights" in the EEZ. The Government cannot define away those historic fishing rights simply because it asserted a right to regulate.

ARGUMENT

I. Congress's 1986 assumption of "sovereign rights" over the Exclusive Economic Zone allowed government regulation but did not abrogate longstanding common law fishing rights in this portion of the high seas.

At great expense, approximately $40,000,000, American Pelagic's predecessor purchased and specially outfitted the

Atlantic Star for mackerel fishing in the EEZ. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1367–68 (Fed. Cir. 2004). American Pelagic received the necessary permits for the *Atlantic Star* to fish for herring and mackerel under the Magnuson Act, 16 U.S.C. §§ 1801–18, which provides the regulatory framework for fishing in the EEZ. Congress then retroactively revoked the permits through politically motivated appropriations riders. *See* Court of Appeals ("CA") Appendix at 3559 (statement of Senator Olympia Snowe); *American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 40–42 (2001), *supplemented*, 55 Fed. Cl. 575 (2003), *rev'd by decision below*, 379 F.3d 1363 (Fed. Cir. 2004). Congress thereby circumvented the Magnuson Act's provisions for determining the need for limitations on affected fisheries. *Id.* In fact, the regulators administering the Act had encouraged American Pelagic's substantial investment in its vessel, the *Atlantic Star*, and raised no environmental concerns with conservation of fish stocks. *American Pelagic*, 49 Fed. Cl. at 42 (Congress acted without consulting fishery officials; government's stock assessment scientist stated that *Atlantic Star*'s entry would have no adverse impact on Atlantic mackerel and herring fisheries).

American Pelagic asserted that the Congressional action constituted a taking of its right to use the *Atlantic Star* to fish, and that it was entitled to compensation under the Fifth Amendment's Takings Clause. The Court of Federal Claims agreed that fishing for mackerel and herring in the EEZ was a right and not merely a matter of governmental grace, awarding more than $37,000,000 in damages to American Pelagic. *American Pelagic Fishing Co. v. United States*, 55 Fed. Cl. 575, 595 (2003), *rev'd by decision below*, 379 F.3d 1363 (Fed. Cir. 2004). *See American Pelagic*, 49 Fed. Cl. at 47 (Government treated fishing in EEZ as "totally a matter of governmental grace."). Reversing

the Court of Federal Claims, the Court of Appeals agreed with the Government that fishing in the EEZ was, in effect, a matter of grace. *American Pelagic*, 379 F.3d at 1377–81. The Court of Appeals determined that the Government did not engage in an uncompensated regulatory taking because American Pelagic had no property right to use the *Atlantic Star* for its only intended purpose, to fish for mackerel and herring. The decision below treated the regulation of fishing permits in the EEZ created by 16 U.S.C. § 1811 as a background principle of law that eliminated any right of fishing vessels to fish in the EEZ. *American Pelagic*, 379 F.3d at 1379.[3]

The Court of Appeals, however, was flatly mistaken in two regards: (1) "sovereign rights" in the EEZ, as asserted by the federal government in the 1986 amendments to 16 U.S.C. § 1811, do not amount to actual sovereignty and are significantly qualified; and (2) even full sovereignty grants the Government power only to regulate fishing resources, and does not extinguish historic rights to fish in the high seas, of which the EEZ is part.

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3 "Because it was already in place by the time American Pelagic purchased the *Atlantic Star*, the Magnuson Act [regulating EEZ fishing] was an 'existing rule' or 'background principle[]' of federal law that inhered in American Pelagic's title to the vessel. *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1031, 1029–30 (1992)]. . . . [A]s far as ownership of the *Atlantic Star* was concerned, the sovereign rights of the United States in the EEZ 'inhere[d] in the title itself, in the restrictions that background principles of the [federal government's] law . . . already place[d] upon . . . ownership.' *Id.* at 1029 . . . . It was against this framework of existing federal restrictions on fishing in the EEZ that American Pelagic invested in the *Atlantic Star*. As of 1996, when the Atlantic Star was purchased, the Magnuson Act and the attendant regulatory scheme precluded any permitted fisherman from possessing a property right in his vessel to fish in the EEZ." *American Pelagic*, 379 F.3d at 1379.

A. *Sovereign rights in the Exclusive Economic Zone are limited, even requiring coastal states to share excess fishing capacity with foreign nations.*

The decision below significantly misstates the legal meaning of "sovereign rights," confusing "sovereign rights" with the more comprehensive term "sovereignty." *Compare American Pelagic*, 379 F.3d at 1378 ("[A]t least as of 1983, the United States had asserted *sovereignty* with respect to the exploration, exploitation, conservation, and management of the natural resources of the EEZ." (emphasis added)) *with* 16 U.S.C. § 1811 ("[T]he United States claims, and will exercise . . . , *sovereign rights* and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." (emphasis added)). What the United States asserted under the 1986 amendment to the Magnuson Act was not *sovereignty* over the EEZ, but the far more limited *sovereign rights*.

Congress passed the Magnuson Act in 1976 to exercise newly claimed jurisdiction to regulate fishing in a previously unregulated area of the high seas deemed the "Fishery Conservation Zone," which later became the EEZ. *American Pelagic*, 379 F.3d at 1377–78. Even after the 1986 amendment to the Magnuson Act asserting American "sovereign rights" in the EEZ pursuant to evolving international customary law, such rights were limited, and constituted far less than full sovereignty: "A state has complete sovereignty over the territorial sea [up to 12 nautical miles from the coast], analogous to that which it possesses over its land territory [and] internal waters . . . . 'Sovereign rights,' which a coastal state enjoys in its exclusive economic zone and on its continental shelf, are functional in character, limited to specific activities." *Restatement (Third) of the Foreign Relations Law of the*

United States § 511 Comment b (1987).[4] Since 1986, the United States has continued to consider the EEZ part of the high seas. "The *res communis* [international territory], consisting of the high seas which for present purposes include exclusive economic zones . . . is not capable of being placed under state sovereignty." Ian Brownlie, *Principles of Public International Law* 105 (6th ed. 2003).[5]

The "sovereign rights" of the United States to regulate fishing in the EEZ are significantly limited in favor of not only private fisherman, as discussed below, but also foreign nations.[6] "[T]he coastal state is required to determine . . . to the extent that it does not have the capacity to harvest the entire allowable catch, the conditions (including allocation of quotas)

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4 *See Restatement (Third) of Foreign Relations Law* § 514 Comment c ("The coastal state does not have sovereignty over the exclusive economic zone but only 'sovereign rights' for a specific purpose—the management of natural resources and other economic activities.").

5 *See Restatement (Third) of Foreign Relations Law* § 512 Comment b ("[A]s a matter of customary law as well as the [Law of the Sea] Convention, the rights and freedoms of other states in the [EEZ] . . . are the same as on the high seas."), § 514 Reporter's Note 2 ("[T]he maritime states did not insist on expressly designating the [EEZ] as high seas [in the Law of the Sea Convention], but the history of the negotiations indicates that they consider that the zone remains high seas, although it will be subject to exceptional rights in favor of the adjacent coastal state."); Brownlie at 192 ("[T]he rights of the coastal state in [an exclusive economic] zone do not amount to sovereignty, and thus other states have rights exercisable over the high seas except as they are qualified by the existence of jurisdictional zones." (footnote omitted)).

6 *See Restatement (Third) of Foreign Relations Law* § 514 Reporter's Note 4 ("The principle of 'optimum utilization' of the living resources of the EEZ requires that the coastal state arrange for harvesting that surplus."); Brownlie at 201 ("Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements . . . give other States access to the surplus of the allowable catch . . . .").

under which other states are given access to the surplus." *Restatement (Third) of Foreign Relations Law* § 514 Comment f. Thus, because Congress prevented the *American Star* from fishing for excess stock in the EEZ, the United States may be required by international law to open its fishery to allow foreign vessels access to the surplus. Ironically, the protection of American Pelagic's domestic rivals that motivated the revocation of the *Atlantic Star*'s permits may backfire, by allowing access to larger foreign vessels instead.

B. *Even full sovereignty grants only power to regulate fishery, not ownership of fish.*

The decision below also fails to recognize that, even full sovereignty would not give the Government unfettered discretion to dispose of fish within the EEZ as a matter of grace. In fact, the Government's full sovereignty in the territorial sea (within 12 nautical miles of the coast) grants no greater power over maritime property than it does over property on land. "A state has complete sovereignty over the territorial sea [up to 12 nautical miles from the coast], analogous to that which it possesses over its *land* territory [and] internal waters . . . ." *Restatement (Third) of Foreign Relations Law* § 511 Comment b (emphasis added).[7] Sovereignty is not a paramount property right but simply "[t]he normal complement of state rights." Brownlie at 106 ("In brief 'sovereignty' is legal shorthand for legal personality of a certain kind, that of statehood.").

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7 *See Restatement (Third) of Foreign Relations Law* § 512 Comment a ("The rights and duties of a state and its jurisdiction are the same in the territorial sea as in its land territory." (citations omitted)); Brownlie at 105 ("Territorial sovereignty *extends principally over land territory*, the territorial sea appurtenant to the land, and the seabed and subsoil of the territorial sea. . . .") (emphasis added).

A case decided by Justice Stephen J. Field when he was Chief Justice of the California Supreme Court, and relied upon by this Court in its analysis of sovereignty issues, parallels this case in the terrestrial context. *Moore v. Smaw*, 17 Cal. 199, 218 (1861), *cited in United States v. Texas*, 339 U.S. at 719 n. 9. *Moore* distinguishes between the state's administrative rights as sovereign and the state's simple ownership rights over gold and silver mines. The case involved the successor to a United States patentee who extracted a gold from the area of his patent. Under Mexican law, before the United States' acquisition of California, precious metals belonged to the state and did not pass with a grant of land unless explicitly mentioned. California claimed that the gold belong to the state, as a sovereign right passed to it by the United States accompanying its statehood. *Moore* held that such precious metal deposits were held by each respective government as any other public property and were alienable by the United States by patent to private parties. "It is undoubtedly true that the United States held certain rights of sovereignty .... But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a State than that of any other property, which is the subject of barter and sale." *Moore*, 17 Cal. at 218.[8]

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8 "In this country [sovereign] authority is vested in the people, and is exercised through the joint action of their Federal and State Governments.... To the existence of this political authority of the State—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same

Moore illustrates how the opinion below confuses sovereignty or "*imperium* (governmental powers of regulation and control)," with "*dominium* (ownership or proprietary rights)." *United States v. Texas*, 339 U.S. 707, 712 (1950). *See id.* at 713 (sovereignty equivalent of *imperium*). "Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority." *Moore*, 17 Cal. at 218. *See United States v. Texas*, 339 U.S. at 719 ("[*D*]*ominium* and *imperium* are normally separable and separate . . . ."). Sovereignty, or *imperium*, may therefore be distinguished from ownership or *dominium*, which can be held publicly or privately:

> The legal competence of a state includes considerable liberties in respect of internal organization and the disposal of territory. This general power of government, administration, and disposition is *imperium*, a capacity recognized and delineated by international law. *Imperium* is thus distinct from *dominium* either in the form of public ownership of property within the state or in the form of private ownership recognized as such by the law.

Brownlie at 106 (footnote omitted).

Without precedent, the Government in this case is asserting exclusive *dominium* in EEZ mackerel and herring,

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manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty." *Moore*, 17 Cal. at 218–19.

precluding private rights, solely by virtue of its *imperium*. The decision below fails to address, however, this Court's highly relevant decision regarding public rights to catch swimming fish in *Toomer v. Witsell*, 334 U.S. 385, 399–402 (1948). This Court in *Toomer* invalidated South Carolina shrimping license fees for non-residents that were 100 times greater than the fees for residents. South Carolina defended on the ground that it owned the fish (including the shrimp) in the territorial sea off its coast and this Court held that any state ownership "rights" were no more than a legal fiction, granting the state regulatory authority, not the right to dispose of "its" shrimp as a matter of grace in violation of the privileges and immunities clause. *Id.*

The decision below failed to cite *Toomer* and instead relied heavily upon discredited dictum from *McCready v. Virginia*, 94 U.S. 391, 394 (1876), to the effect that the States owned "fish in [tidewaters], so far as they are capable of ownership while running." *American Pelagic*, 379 F.3d at 1379. *Toomer*, in fact criticized *McCready*, restricting its application to oysters and similar immobile shellfish. *Toomer*, 334 U.S. 400–02 (shellfish immobile in the soil, part of government *dominium* if not granted away). *Toomer* held that fish are similar to wild game on land, effectively unowned but capable of becoming owned privately when captured. *Id. See* Joseph K. Angell, *Treatise on the Right of Property in Tide Waters* 137, 141 (2d ed. 1847).

> The whole [state] ownership theory [over wild animals], in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.

Toomer, 334 U.S. at 402. *See id* at 402 n.37 ("The fiction apparently gained currency partly as a result of confusion between the Roman term *imperium* or governmental power to regulate, and *dominium*, or ownership. Power over fish and game was, in origin, *imperium*.").[9] The Government's rights in such fish are to regulate the means of their capture so as best to preserve the resource. Roscoe Pound, *An Introduction to the Philosophy of Law* 111 (2d ed. 1954). American Pelagic's use of the *Atlantic Star* was permissibly consistent with preservation of these resources in accordance with longstanding understanding of the Government's sovereign right to regulate, *American Pelagic*, 49 Fed. Cl. at 51; it was not, however,

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9 The nature of the Government's rights in fish and game are best described by Dean Roscoe Pound in the analysis relied upon by this Court in *Toomer*: "In modern law, as a result of the medieval confusion of the power of the sovereign to regulate the use of things (*imperium*) with ownership (*dominium*) and of the idea of the corporate personality of the state, we have made [*res publicae*] into property of public corporations. . . . We are also tending to limit the idea of discovery and occupation by making *res nullius* (e.g. wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (e.g. of the use of running water for irrigation or power) by declaring that they are property of the state or are 'owned by the state in trust for the people.' It should be said, however, that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, **in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*.** The state as a corporation does not own a river as it owns the furniture in the state house. It does not own wild game as it owns the cash in the vaults of the treasury. **What is meant is that the conservation of important social resources requires regulation of the use of *res communes*** to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination." Roscoe Pound, *An Introduction to the Philosophy of Law* 111 (2d ed. 1954) (bold emphasis added), *cited in Toomer*, 334 U.S. at 402 n.37.

consistent with the political desire to protect existing fisherman from competition.

The decision below similarly disparaged historic support for free fishing rights in the high seas covered by the Magnuson Act's EEZ. As argued by Petitioner, the right to fish in the high seas and public waters is of ancient provenance. Petition at 12–13 & n.5. The decision below nevertheless baldly asserts that the Magnuson Act "does not explicitly, or implicitly, preserve any potential pre-existing common law right to fish in the EEZ." *American Pelagic*, 379 F.3d at 1380. The decision ignores the fact that the EEZ was created in light of longstanding common law fishing rights in the portion of the high seas that became part of the EEZ.[10] Statutes such as the Magnuson act, "which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen v. Johnson*, 343 U.S. 779, 783 (1952)). It was not incumbent on Congress to include

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10 *See* Angell at 124 ("Fishery in the sea . . . constituting as it does, a great source of sustentation, has in all ages and in all countries been deemed of such importance, that it has ever been regarded a privilege open and common to all persons."). *See also id.* at 142–43; Sir Matthew Hale, *De Jure Maris*, in Stuart A. Moore, ed., *A History of the Foreshore* 370, 377 (3d ed. 1888) ("[T]he common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it . . . ."); 3 James Kent, *Commentaries on American Law* *412–13 (Oliver Wendell Holmes, ed., 12th ed. 1873) ("[T]he right of fishing in the seas . . . under the free . . . genius of the English common law, is a right public and common to every person . . . . The common right of fishing in navigable waters is founded on such plain principles of natural law, that it is considered by many jurists as part of the law of nations.").

explicit reservations extending the common law right to fish in the EEZ; rather, Congress would have had to exclude such common law fishing rights expressly if it had intended to attempt to abolish them through the Magnuson Act.

As discussed above, the opinion below disregarded (1) *Toomer*'s holding that the Government's power over fish in the high seas is one of regulation and not ownership and (2) the canon of statutory construction that the Magnuson Act should be interpreted to be consistent with the common law public rights to free fishing in the high seas. This Court should grant *certiorari* because the decision below "conflicts with relevant decisions of this Court" on the important federal question whether private investments to exploit the resources of the EEZ are ephemeral because all activity in the EEZ is simply a matter of government grace. Sup. Ct. R. 10 (c).

II. A recently enacted regulatory scheme which encouraged American Pelagic to invest cannot be transformed into a background principle of law in order to strip American Pelagic's property of Takings Clause protections.

As discussed above, Congress amended the Magnuson Act in 1986 in part to claim sovereign rights in the EEZ under new customary law as largely codified in the Law of the Sea Convention. *American Pelagic*, 379 F.3d at 1377–78. Nevertheless, contrary to this Court's strict admonition in *Palazzolo* that "background principles" must rest on longstanding legal traditions, the opinion below treated the Magnuson Act's relatively recent regulatory scheme as a background principle of law shaping the meaning of American Pelagic's property in the *Atlantic Star*. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) ("[O]ur description of the concept

[of background principles] in *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] . . . is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition, see *id.* at 1029–30."); *Lucas*, 505 U.S. at 1029 ("Any limitation so severe *cannot be newly legislated or decreed* (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." (emphasis added)). Background principles thus rest on long-standing legal traditions, not novel enactments like the Magnuson Act. As argued by the Petitioner, Petition at 14–16, this Court ruled in *Palazzolo* that novel regulations passed before acquisition of property (the *Atlantic Star* in this case), like the Magnuson Act cannot be considered "background principles." *See Palazzolo*, 533 U.S. at 630 (a regulatory taking "claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction").

As urged by Petitioner, Petition at 4–5, 15, regulatory enactments should be treated in the analysis of a property owner's investment-backed expectations under the partial regulatory taking test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 127–28 (1978). *See Palazzolo*, 533 U.S. at 635–36 (O'Connor, J., concurring). Such novel regulations cannnot be background principles defining an underlying property interest. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003).[11] Moreover, as

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11 "Before examining the critical question about reasonableness . . . , we start with an analysis of the [property owners'] actual expectation because we require actual expectation of, or reliance on the government not nullifying the [property owners'] . . . regulatory rights as a threshold matter. The [property owners'] expectation . . . would not really be 'investment-

determined by the factfinder in this case, American Pelagic reasonably expected to use the *Atlantic Star* to fish in the EEZ. *American Pelagic*, 49 Fed. Cl. at 49–51.

In this case, the decision below used the Magnuson Act's regulation of fishing rights as justification for denying property protections to American Pelagic's investment in the *Atlantic Star* simply because of the passage of the Act. The decision's logic, at its narrowest, deprives all fishing vessel owners of any property right to use their vessels for their intended purpose, to fish. All use of the EEZ for fishing or for other purposes, such as oil and gas exploration, regardless of how significant the financial investment, would be entirely a matter of governmental grace, subject to cancellation at any time because the authority for the Government's regulation of industry derives from its rights as sovereign. More broadly applied, the opinion's sweeping language, 379 F.3d at 1376–83, eliminates property protections for any investment made in a regulated industry. The decision below thereby stretches *Lucas*'s concept of background principles beyond the breaking point, eviscerating investors' expectations.

Moreover, the opinion below contravenes the purpose of background principles, which is to prevent harm to public resources. *Palazzolo*, 533 U.S. at 629–30.[12] In this case, the

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backed' unless they actually believed in a certain outcome and entered the program in reliance on it." *Cienega Gardens*, 331 F.3d at 1346.

12 "It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment. . . . The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. See *id.* at 1030 (*'The "total taking" inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of*

Government's fishing stock assessment scientist explicitly discounted any scientific basis for revoking the *Atlantic Star*'s fishing permits. *See American Pelagic*, 49 Fed. Cl. at 43. Based on this Court's teaching, the concept of background principles of law cannot be used to undermine property protections for investments made after an industry became subject to some largely unrelated regulation. The decision below contradicts both *Lucas* and *Palazzolo*. This Court should grant *certiorari* because the Court of Appeals for the Federal Circuit, with jurisdiction over all claims for regulatory confiscations against the federal government, has misinterpreted this basic component of Takings Clause jurisprudence.

III. The Court of Appeals decision below conflicts with decisions of state courts and other federal Courts of Appeal that recognize investment in regulated industries as a property interest worthy of protection.

The Petitioner brings to this Court's attention a number of decisions by other federal Courts of Appeals and by state courts that conflict with the clear import of the decision below. Petition at 19–20. The decision below also directly contradicts a number of recent decisions of the Federal Circuit itself, which acknowledge that investments made in an economic sector subject to significant regulation may nevertheless warrant protection from regulatory takings as a property interest. *Cienega Gardens*, 331 F.3d at 1350.[13] Other panels of the Court of

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harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities'). A law does not become a background principle for subsequent owners by enactment itself." *Palazzolo*, 533 U.S. at 629–30 (emphasis added).

13 "A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that *all* regulatory changes

Appeals for the Federal Circuit have even held that the federal navigational servitude is not a complete defense to recovery for a regulatory taking. *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000); *Loveladies Harbor, Inc. v. United States*, 21 Ct. Cl. 153, 154 n.3 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

State courts interpreting the federal Constitution agree that the existence of a permitting system constitutes recognition that property rights exist in regulated property because regulation implies that permits will in fact be granted. *See Vatalaro v. Department of Envtl. Reg.*, 601 So. 2d 1223, 1229 (Fla. App.), *review denied*, 613 So. 2d 3 (Fla. 1992); *Picciolo v. Jones*, 534 So. 2d 875, 878 (Fla. App. 1988), *review denied*, 544 So. 2d 200 (Fla.), *cert. denied*, 493 U.S. 848 (1989).[14] *See also Palm Beach Isles*, 231 F.3d at 1364 ("The existence of a regulatory regime does not per se preclude all investment-backed expectations for development.").

In this case, the Government completely destroyed any ability of the *Atlantic Star* to fish for the two underfished species of fish for which that the ship was specially outfitted.

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are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever. . . . For expectations to be 'greatly reduced' does not mean that the reasonableness of every expectation of the status quo is by definition eliminated. . . . The range of expectations that is reasonable may be reduced in proportion to the amount of regulation, but this is not a blanket rule that disqualifies parties' expectations without inquiry." *Id.* (emphasis in original) (citations omitted).

14 "The fact that [property] is subject to the regulatory power of the State . . . does not conclude the matter; the power to regulate does not . . . permit a taking for public use without payment to the owner of just compensation." *Id.* (access channel to lake dredged in 1930s, permitting tidal inflow and authorization to regulate, not subjecting the property to public trust).

As determined by the Court of Federal Claims, the Government's action (taken by Congress and aimed specifically at the *Atlantic Star*) was outside the normal regulatory scheme and, manifestly, not what a reasonable investor could have expected, especially one who was encouraged to go into the specific market (herring and mackerel fishing) by the Government itself. *American Pelagic*, 49 Fed. Cl. at 49–50. The court found that American Pelagic's "expectation of being able to use its vessel to fish for Atlantic mackerel was ... reasonable." 49 Fed. Cl. at 49.[15]

American Pelagic invested in the *Atlantic Star* in a manner similar to the property developers whom the Government encouraged to invest in subsidized housing in *Cienega Gardens*. The decision below conflicts not only with this Court's precedents and earlier decisions of the Court of Appeals for the Federal Circuit recognizing property rights in investments made in regulated industries. The decision below also conflicts with decisions of other Courts of Appeals, as detailed by Petitioner, and those of state courts. *See Vatalaro*, 601 So. 2d at 1229; *Picciolo*, 534 So. 2d at 878. This Court should grant *certiorari* to reconcile the difference among the circuits and between the Court of Appeals for the Federal Circuit and the state courts on this critically important question of the Takings Clause protection afforded to regulated property.

CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioner American Pelagic for a writ of

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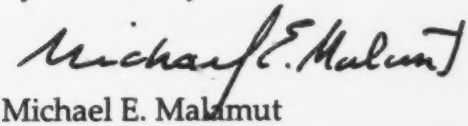
15 "Indeed, the government ... induced plaintiff to make its investment in the *Atlantic Star*.... [American Pelagic] could not have anticipated that Congress would single it out to revoke its permits by legislation." *Id.*

certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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